

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-3326
Case No. 2014-CP-10-4335
Appellate Case No. 2017-000542

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APR 28 2017

SC Court of Appeals

Waverly at Hamlin Plantation Townhome Association,
Inc.,

Plaintiff,

v.

John Wieland Homes and Neighborhoods of the
Carolinas, Inc. as Successor by Statutory Merger to
John Wieland Homes and Neighborhoods of South
Carolina, Inc., John Wieland Homes of Charleston, Inc.,
John Wieland Homes, Inc.,

Defendants,

And

John Wieland Homes and Neighborhoods of the
Carolinas, Inc., as Successor by Statutory Merger to
John Wieland Homes and Neighborhoods of South
Carolina, Inc., John Wieland Homes of Charleston, Inc.,
John Wieland Homes Inc., Builders Support Services
of the Carolinas, Inc.,

*Third-Party
Plaintiffs,*

v.

Barr Construction, Inc. Benjamin Mora d/b/a Mora
Construction, a/k/a Benjamin Mora Construction,
LLC, Builders FirstSource, Inc., a/k/a Builders
FirstSource-Southeast Group, LLC, a/k/a Builders
FirstSource-Atlantic Group, LLC, DBC Construction
Services, LLC, Eli, Inc, Gerardo Rosette Sanchez a/k/a
GR Painting, Jeorge Medina, Jeorge Medina a/k/a JMC
Construction, LLC a/k/a JMC Construction, Inc., Jesus
Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan
Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez
Brothers Painting, Latitude Construction Services,

LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC,

*Third-Party
Defendants,*

Of whom

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., is the

Appellant,

And

Waverly at Hamlin Plantation Townhome Association, Inc., Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, and The Muhler Company, Inc., are

Respondents.

And

Jeffrey Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephani Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Maryann Walsh, Patty Whitmire, Donald L. Tomasello and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan S. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Waters, James and Andrea Lowry, R. Robinson, Jr. Thaddeus R. and Barbara A. Kuczynski, Beverly Sunders Carlson, Lisa Roeck, Elizabeth Jackson, Charles and Mary Kathleen Jenkins, Linda M. and Earl K. Rigler, Jr., John Twomey, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Carol and Chris Gillespie, Jared D. Overcash,

Plaintiffs,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a Jon Wieland Homes and Neighborhoods, Inc., Bar Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builder's Firstsource, Inc. a/k/a Builders Firstsource-Atlantic Group, LLC, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medine a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasque, Richard Ditullio, Richard Ditullio a/k/a ROT Contracting, LLC,

Defendants,

Of whom

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., is the

Appellant.

And

Jeffrey Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephani Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Maryann Walsh, Patty Whitmire, Donald L. Tomasello and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan S. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Waters, James and Andrea Lowry, R. Robinson, Jr. Thaddeus R. and Barbara A. Kuczynski, Beverly Sunders Carlson, Lisa Roeck, Elizabeth Jackson, Charles and Mary Kathleen


Jenkins, Linda M. and Earl K. Rigler, Jr., John Twomey, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Carol and Chris Gilespe, Jared D. Overcash, Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, and The Muhler Company, Inc., are the

Respondents.

MOTION TO SUPPLEMENT THE RECORD

Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., hereby moves this Court for an Order pursuant to Rules 212(b) and 240, SCACR, supplementing the Record on Appeal with the Orders Granting Directed Verdict as to Certain Causes of Action executed by The Honorable Deadra L. Jefferson on March 24, 2017 and filed on March 24, 2017 (attached hereto as Exhibit A).

[Separate Signature Page Follows]



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***Attorneys for Builder Support Services
of the Carolinas, Inc., John Wieland
Homes and Neighborhoods of South
Carolina, Inc., John Wieland Homes and
Neighborhoods of the Carolinas, Inc.,
John Wieland Homes Inc., John Wieland
Homes of Charleston, Inc.***

April 26, 2017

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc., et al.,

Defendants.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Stephen Denby, et al.,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc., et al.,

Defendants.

Presiding Judge:
Counsel for Plaintiff:

Counsel for John Wieland Homes:

Date of Hearing:
Court Reporter:

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

**ORDER GRANTING DIRECTED
VERDICT AS TO CERTAIN
CAUSES OF ACTION**

IN THE COURT OF COMMON PLEAS

C/A No.: 2014-CP-10-4335

FILED
JULIE J. ARMSTRONG
CLERK OF COURT

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Hon. Deadra L. Jefferson
John Hayes, IV, Esq.
I. Keith McCarty, Esq.
Mary Margaret Noland, Esq.
Theodore Manos, Esq.
Andrew Haselden, Esq.
Justin Novak, Esq.
January 26, 2016
Phyllis Norton

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[Signature]

THIS MATTER came before the Court for a consolidated trial by jury on January 23-30, 2017. Present at the trial were John Hayes, Esquire, Mary Margaret Noland, Esquire and I. Keith McCarty, Esquire, representing the Plaintiffs, and Theodore Manos, Esquire, Justin Novak, Esquire and Andrew Haselden, Esquire, representing Defendant John Wieland Homes. At the close of Plaintiffs' case on January 25, 2017, this matter came before the Court, pursuant to Rule 50 of the South Carolina Rules of Civil Procedure, on a Motion for Directed Verdict by the Defendant John Wieland Homes as to various causes of action asserted by Plaintiffs. Viewing the evidence and all reasonable inferences in the light most favorable to the Plaintiffs, the Defendant John Wieland Homes' Motion for Directed Verdict is hereby granted in part and denied in part.¹

INTRODUCTION

In their amended pleadings, Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc. asserted six (6) causes of action against Defendant John Wieland Homes.² The class action suit involving Stephen Denby as class representative asserted fourteen (14) causes of action against Defendant John Wieland Homes.³ However, during the trial and prior to

¹ At the time of the motion the Court ruled contemporaneously indicating that a formal Order would be submitted by the Court.

² Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc. pled the following causes of action against Defendants John Wieland Homes in their Amended Summons and Complaint, filed December 19, 2014: (1) Unfair Trade Practices; (2) Breach of Implied Warranty of Fitness of Habitability; (3) Breach of Implied Warranty of Fitness for Particular Purpose; (4) Negligence; (5) Breach of Contract; and (6) Breach of Fiduciary Duty.

³ The class action suit, involving Stephen Denby as class representative pled the following causes of action against Defendant John Wieland Homes in their Amended Summons and Complaint, filed March 4, 2015: (1) Negligence, Professional Negligence, and Gross Negligence; (2) Negligent Misrepresentation; (3) Breach of Implied Warranty; (4) Breach of Implied Warranty of Fitness of Habitability; (5) Breach of Implied Warranty of Fitness for a Particular Purpose; (6) Breach of Implied Warranties as to the Project's Development and Construction; (7) Individual Liability as to the Developer Defendants; (8) Violation of the S.C. Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq.*; (9) Breach of Fiduciary Duty by Initial Board Members of the Waverly at Hamlin Plantation Townhome Association, Inc.; (10) Breach of Fiduciary Duty; (11) Breach of Contract; (12) Violation of the Residential Property Condition Disclosure Act; (13) Strict Liability; and (14) Alter Ego Liability and Piercing the Corporate Veil.

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Defendant John Wieland Homes' Motion for Directed Verdicts, Plaintiffs stated, on the record, that they were only proceeding on the following causes of action:

- Denby:
- (1) Negligence;
 - (2) Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing;
 - (3) Breach of Warranty;
 - (4) Violation of the South Carolina Unfair Trade Practices Act;
 - (5) Breach of Fiduciary Duty; and
 - (6) Negligent Misrepresentation.

- Waverly:
- (1) Negligence;
 - (2) Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing;
 - (3) Breach of Warranty;
 - (4) Violation of the South Carolina Unfair Trade Practices Act;
 - (5) Breach of Fiduciary Duty; and
 - (6) Negligent Misrepresentation.

STANDARD OF REVIEW

Pursuant to Rule 50(a) of the South Carolina Rules of Civil Procedure, a trial court may, upon a motion by a party at the close of evidence offered by the party's opponent, direct a verdict if the case presents only questions of law. When considering a party's Rule 50, SCRCPP, motion for directed verdict, the trial court must view the evidence and any reasonable inferences therefrom in the light most favorable to the nonmoving party. *Eadie v. Krause*, 381 S.C. 55, 57, 671 S.E.2d 389, 390 (Ct. App. 2010); *Law v. S.C. Dep't of Corrs.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Cutchin v. South Carolina Dept. of Highways & Public Transportation*, 301 S.C. 35, 389 S.E.2d 646 (1990). The court cannot ignore facts unfavorable to the nonmoving party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts. *Hopson v. Clary*, 321 S.C. 312, 468 S.E.3d 305 (Ct. App. 1996); *Haulbrooks v. Overton*, 295 S.C. 380, 368 S.E.2d 676 (Ct. App. 1988). A jury issue is not created where the evidence taken as a whole is susceptible to only one reasonable inference.

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Hopson, 321 S.C. at 314, 468 S.E.2d at 307; *Whelan v. Welch*, 304 S.C. 548, 405 S.E.2d 836 (Ct. App. 1991). "It is not the province of the court to weigh the testimony, but simply to determine if there is any relevant, competent testimony reasonably tending to establish the material elements of plaintiff's cause of action." *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965). "If more than one reasonable inference can be drawn . . . the case should be submitted to the jury." *Id.*

LEGAL ANALYSIS

I. Defendant John Wieland Homes' Motion for Directed Verdict in the class action suit involving Stephen Denby as class representative is granted in part and denied in part.

After considering the arguments of counsel and the evidence presented, the Court grants Defendant's Motion for Directed Verdict in the class action suit involving Stephen Denby as class representative as to the following causes of action: (1) Breach of Implied Warranties of Habitability, Workmanlike Service, Fitness for a Particular Purpose, and Good Faith and Fair Dealing; (2) Violation of the South Carolina Unfair Trade Practices Act; (3) Breach of Fiduciary Duty; and (4) Negligent Misrepresentation. Further, the Court denies Defendant's Motion for Directed Verdict as to the following causes of action: (1) Negligence; and (2) Breach of Warranty.

A. Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing

Although not originally pled in Plaintiff's Complaint,⁴ Plaintiff's claims against Defendant John Wieland Homes concerning Breach of Implied Warranties were pled during the

⁴ Plaintiff's Amended Summons and Complaint, filed March 4, 2015, raises the following causes of action concerning Implied Warranties: Breach of Implied Warranty; Breach of Implied Warranty of Fitness of Habitability; Breach of Implied Warranty of Fitness for Particular Purpose; and Breach of Implied Warranties as to the Project's Development and Construction. However, during the trial, Counsel stipulated that the underlying causes of action actually pled by the Plaintiffs were better characterized as follows: Breach of

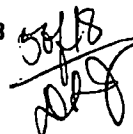
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proceedings as follows: Breach of Implied Warranty of Habitability, Workmanlike Service, Fitness for a Particular Purpose, and Good Faith and Fair Dealing.

The Implied Warranty of Workmanlike Service states that "[a] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008). This warranty is separate and distinct from the warranty of habitability. "In a sale of a new house by a builder who is also the seller, there is both an implied warranty that the house was built in a reasonably workmanlike manner and an implied warranty that the house is reasonably suitable for habitation." 17 S.C. Jur. Construction Law § 54 (citing, *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S. C. 335, 384 S. E. 2d 730 (1989)). "To establish a claim for breach of an implied warranty of workmanlike services, a plaintiff must show that the builder failed to perform its work in a careful, diligent, and workmanlike manner." *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). "An implied warranty of workmanlike service extends not only to the original purchasers of the home, with whom the builder is in privity, but to subsequent purchasers who may pursue a cause of action in contract or tort against a builder *for a reasonable period after the home's construction.*" *Fields v. J. Haynes Waters Builders, Inc.*, 658 S.E.2d 80 (S.C. 2008)(emphasis added).

In contrast, the Implied Warranty of Habitability is synonymous with the Implied Warranty of Fitness for its Intended Use, and concerns the sale of new homes. A builder/vendor of a new house gives his purchaser an implied warranty that the house is fit for its intended use. *See, Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976). *Kennedy v. Columbia*

Implied Warranty of Habitability, Breach of Implied Warranty of Fitness for Particular Purpose, and Breach of Implied Warranty of Workmanlike Service and Good Faith and Fair Dealing.



Lumber and Manufacturing Company, Inc. makes clear that Implied Warranty of Habitability springs from the sale of a new home. 299 S.C. 335, 384 S.E.2d 730 (1989) ("the warranty of habitability arises or springs from the sale of the home").

The causes of action concerning the Implied Warranties are inapplicable to the class action Plaintiffs. The Implied Warranty of Habitability pled by Plaintiffs concerns the construction of new homes. Additionally, this type of warranty focuses on the transaction of the new homes sold to the homeowners. In the present case, Plaintiffs provided no evidence that the homes were purchased from the builder/vendor nor did Plaintiffs provide evidence that the homes were built recently. In fact, the construction of the homes commenced over ten (10) years ago. As such, Plaintiffs' claim for Breach of Implied Warranty of Habitability fails.

Similarly, Plaintiff's cause of action for Breach of Workmanlike Service also fails. This cause of action allows subsequent purchasers to bring suit against a builder even in the absence of contractual privity. However, this cause of action must be brought within a reasonable period after the construction of the new home. The construction of the class action Plaintiffs' homes occurred over ten (10) years ago. As such, the Implied Warranty of Workmanlike Service is untimely as it was not brought within a reasonable time period. Further the record is void of any testimony regarding any sales transactions of the residences.

Finally, there exists no Implied Warranty of Good Faith and Fair Dealing. In every contract, there exists an implied covenant of good faith and fair dealing. *Time Warner Cable v. Condo Services, Inc.*, 381 S.C. 275, 672 S.E.2d 816 (Ct. App. 2009). However, this cause of action is not separate and distinct from a claim for breach of contract as it must be treated as merely another term of the contract at issue. *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004). Accordingly, as Plaintiffs did not bring a cause of

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action for Breach of Contract, Defendant John Wieland Homes' Motion for Directed Verdict is granted as to the Implied Warranty of Good Faith and Fair Dealing.

Finally, the record is devoid of any evidence supporting the Plaintiffs' claims concerning Breach of Implied Warranties as the Plaintiffs failed to produce any evidence to support this cause of action. The evidence and testimony provided by Plaintiffs in their case in chief is pled as a Negligence cause of action rather than an Implied Warranties cause of action. Accordingly, Defendant John Wieland Homes Motion for Directed Verdict as to the class action Plaintiffs' cause of action for Breach of Implied Warranties is granted while their Motion for Directed Verdict as to the Negligence cause of action is denied.

B. Violation of the South Carolina Unfair Trade Practices Act

The Plaintiffs' cause of action for Violation of the South Carolina Unfair Trade Practices Act also fails. Section 39-5-20 of the South Carolina Code of Laws outlines the South Carolina Unfair Trade Practices Act and states that "any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." To prevail in a SCUPTA claim,

[p]laintiffs must allege and prove that the defendant's actions adversely affected the public interest. . . An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.

Singleton v. Stokes Motors, Inc., 358 S.C. 369, 595 S.E.2d 461 (2004). "Plaintiffs . . . generally have shown potential for repetition in two ways: (1) by showing the same kind of actions

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occurred in the past, thus making it likely they will continue to occur absent deterrence . . . or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 43-44, 664 S.E.2d 83, 89 (Ct. App. 2008) (quoting, *Daisy Outdoor Adver. Co., Inc. v. Abbott*, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996)).

In the present case, Plaintiffs provided no testimony or evidence to prove that Defendant John Wieland Homes' actions affected the public interest. There was neither evidence presented showing the same kind of actions occurring in the past nor was there evidence presented that Defendant John Wieland Homes' company procedures created a potential for repetition of the unfair and deceptive acts.

Furthermore, pursuant to the SCUPTA statute, a class may not maintain an action under the statute. *See, Dema v. Tenet Physician Servs-Hilton Head, Inc.*, 383 S.C. 115, 122, 678 S.E.2d 430, 434 (2009) ("SCUPTA claims may not be maintained in a class action law suit"). Accordingly, the class action suit involving Stephen Denby as class representative's cause of action of a Violation of the South Carolina Unfair Trade Practices Act, must be denied on these grounds as well.

For these reasons stated herein, the Court grants Defendant John Wieland Homes' Motion for Directed Verdict as to the class action Plaintiffs cause of action of Violation of the South Carolina Unfair Trade Practices Act.

C. Breach of Fiduciary Duty

Defendant John Wieland Homes' Motion for Directed Verdict as to the class action Plaintiffs' cause of action concerning breach of fiduciary duty is granted. "A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and

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fidelity of another. . . . A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence." *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004). "Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003). With regards to builders' duties, "[a] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008).

Accordingly, there is evidence in the record to support the finding that Defendant John Wieland Homes owed Plaintiffs a duty to perform the building of the townhomes in a careful, diligent, workmanlike manner. However, there is insufficient evidence to conclude that this duty rose to the level of a fiduciary duty. Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to the class action Plaintiff's cause of action of breach of Fiduciary Duty is granted.

D. Negligent Misrepresentation

Defendant John Wieland Homes' Motion for Directed Verdict as to the class action Plaintiffs' cause of action for Negligent Misrepresentation is granted. "To state a claim for negligent misrepresentation, the plaintiff must allege (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff



justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation." *Hurst v. Sandy*, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997).

In the present case, the Plaintiffs presented insufficient evidence to support a finding that Defendant John Wieland Homes negligently misrepresented the building of the townhomes. There is no evidence set forth in the record to support a finding that Defendant John Wieland Homes made representations to the class action Plaintiffs. Further, even if there were representations made by Defendant John Wieland Homes, there is no evidence in the record to support a finding that the class action Plaintiffs relied on these representations in purchasing their townhomes. Accordingly, because the class action Plaintiffs failed to provide sufficient evidence to justify a cause of action of negligent representation against Defendant John Wieland Homes, Defendant's Motion for Directed Verdict is granted.

E. Negligence and Breach of Warranty

As to the remaining causes of actions, Negligence and Breach of Warranty, this Court finds that there exists sufficient evidence in the record to deny Defendant John Wieland Homes' Motion for Directed Verdict. Plaintiffs produced evidence sufficient to create a factual question for the jury as to Defendant John Wieland Homes' liability concerning the cause of action of Negligence and Breach of Warranty. As such, Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiffs' causes of action of Negligence and Breach of Warranty are denied.

Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to the class action suit brought by Plaintiff Stephen Denby, as class representative, is hereby GRANTED in part and DENIED in part.

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II. Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiff Waverly Townhome Association, Inc. is granted in part and denied in part.

After considering the arguments of counsel and the evidence presented, the Court grants Defendant's Motion for Directed Verdict as to Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc.'s for the following causes of action: 1) Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing; (2) Violation of the South Carolina Unfair Trade Practices Act; (3) Breach of Warranty; and (4) Negligent Misrepresentation. However, the Court finds that directed verdicts would not be appropriate for the remaining causes of action of both Breach of Fiduciary Duty and Negligence.

A. Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing

Although not originally pled in Plaintiff Waverly at Hamlin Plantation's Complaint,⁵ Plaintiff's claims against Defendant John Wieland Homes' concerning Breach of Implied Warranties were pled during the proceedings as follows: Breach of Implied Warranty of Habitability, Workmanlike Service, Fitness for a Particular Purpose, and Good Faith and Fair Dealing.

The Implied Warranty of Workmanlike Service states that "[a] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008). This warranty is separate and distinct from the warranty of habitability. "In a sale of a new house by a builder who is also the seller, there is both an implied warranty that the house

⁵ The Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc.'s Amended Summons and Complaint, filed December 19, 2014, raises the following causes of action concerning implied warranties: Breach of Implied Warranty of Fitness of Habitability and Breach of Implied Warranty of Fitness for Particular Purpose. However, during the trial, Counsel stipulated that the underlying causes of action actually pled by the *Waverly* Plaintiffs were better characterized as follows: Breach of Implied Warranty of Habitability, Breach of Implied Warranty of Fitness for Particular Purpose, and Breach of Implied Warranty of Workmanlike Service and Good Faith and Fair Dealing.

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was built in a reasonably workmanlike manner and an implied warranty that the house is reasonably suitable for habitation." 17 S.C. Jur. Construction Law § 54 (citing, *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S. C. 335, 384 S. E. 2d 730 (1989). "To establish a claim for breach of an implied warranty of workmanlike services, a plaintiff must show that the builder failed to perform its work in a careful, diligent, and workmanlike manner." *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). "An implied warranty of workmanlike service extends not only to the original purchasers of the home, with whom the builder is in privity, but to subsequent purchasers who may pursue a cause of action in contract or tort against a builder *for a reasonable period after the home's construction.*" *Fields v. J. Haynes Waters Builders, Inc.*, 658 S.E.2d 80 (S.C. 2008)(emphasis added).

In contrast, the Implied Warranty of Habitability is synonymous with the Implied Warranty of Fitness for its Intended Use, and concerns the sale of new homes. A builder/vendor of a new house gives his purchaser an implied warranty that the house is fit for its intended use. See, *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976). *Kennedy v. Columbia Lumber and Manufacturing Company, Inc.* makes clear that Implied Warranty of Habitability springs from the sale of a new home. 299 S.C. 335, 384 S.E.2d 730 (1989) ("the warranty of habitability arises or springs from the sale of the home").

The causes of action concerning the Implied Warranties are inapplicable to the class action Plaintiffs. The Implied Warranty of Habitability pled by Plaintiffs concerns the construction of new homes. Additionally, this type of warranty focuses on the transaction of the new homes being sold to the homeowners. In the present case, Plaintiffs provided no evidence that the homes were purchased from the builder/vendor nor did Plaintiffs provide evidence that

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the homes were built recently. In fact, the construction of the homes commenced over ten (10) years ago. As such, Plaintiffs' claim for Breach of Implied Warranty of Habitability fails.

Similarly, Plaintiff's cause of action for Breach of Workmanlike Service also fails. This cause of action allows subsequent purchasers to bring suit against a builder even in the absence of contractual privity. However, this cause of action must be brought within a reasonable period after the construction of the new home. The construction of the class action Plaintiffs' homes occurred over ten (10) years ago. As such, the Implied Warranty of Workmanlike Service is untimely as it was not brought within a reasonable time period.

Finally, there exists no Implied Warranty of Good Faith and Fair Dealing. In every contract, there exists an implied covenant of good faith and fair dealing. *Time Warner Cable v. Condo Services, Inc.*, 381 S.C. 275, 672 S.E.2d 816 (Ct. App. 2009). However, this cause of action is not separate and distinct from a claim for breach of contract as it must be treated as merely another term of the contract at issue. *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004). Accordingly, as Plaintiffs did not bring a cause of action for Breach of Contract, Defendant John Wieland Homes' Motion for Directed Verdict is granted as to the Implied Warranty of Good Faith and Fair Dealing.

Finally, the record is devoid of any evidence to support the Plaintiff's claims concerning Breach of Implied Warranties as the Plaintiff failed to produce any evidence to support this cause of action. The evidence and testimony provided by Plaintiffs in their case in chief is pled as a Negligence cause of action rather than an Implied Warranties cause of action. Accordingly, Defendant John Wieland Homes Motion for Directed Verdict as to the Plaintiff Waverly at Hamlin Plantation's cause of action for Breach of Implied Warranties is granted while their Motion for Directed Verdict as to the Negligence cause of action is denied.

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B. Violation of the South Carolina Unfair Trade Practices Act

Plaintiff Waverly at Hamlin Plantation's cause of action for Violation of the South Carolina Unfair Trade Practices Act also fails. Section 39-5-20 of the South Carolina Code of Laws outlines the South Carolina Unfair Trade Practices Act and states that "any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." To prevail in a SCUPTA claim,

[p]laintiffs must allege and prove that the defendant's actions adversely affected the public interest. . . An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.

Singleton v. Stokes Motors, Inc., 358 S.C. 369, 595 S.E.2d 461 (2004). "Plaintiffs . . . generally have shown potential for repetition in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence . . . or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 43-44, 664 S.E.2d 83, 89 (Ct. App. 2008) (quoting, *Daisy Outdoor Adver. Co., Inc. v. Abbott*, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996)).

In the present case, Plaintiff provided no testimony or evidence to prove that Defendant John Wieland Homes' actions affected the public interest. There was neither evidence presented showing the same kind of actions occurring in the past nor was there evidence presented that Defendant John Wieland Homes' company procedures created a potential for repetition of the

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unfair and deceptive acts. Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiff Waverly at Hamlin Plantation's cause of action for Violation of the South Carolina Unfair Trade Practices Act is granted.

C. Breach of Warranty

Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiff Waverly at Hamlin Plantation's cause of action for Breach of Warranty is granted. "A warranty is created when the seller makes an affirmation with respect to the thing to be sold with the intention that the buyer shall rely on it in making the purchase." *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 284 (Ct. App. 1993); *See also, Roland v. Heritage Litchfield, Inc.*, 372 S.C. 161, 641 S.E.2d 465 (Ct. App. 2007). "An action for breach of warranty requires the existence of an express or implied warranty as described in sections 36-2-313 and 36-2-314, respectively." *Herring v. Home Depot, Inc.*, 350 S.C. 373, 379, 565 S.E.2d 773, 776 (Ct. App. 2002). With regards to an express warranty, S.C. Code § 36-2-313 states;

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise, including those on containers or labels, made by the seller to the buyer, whether directly or indirectly, which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

S.C. Code § 36-3-213.

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Accordingly, Plaintiff Waverly at Hamlin Plantation produced insufficient evidence to conclude that a warranty was made on behalf of Defendant John Wieland Homes to the Plaintiffs. Unlike the class action suit, the Waverly Townhome Association did not purchase the townhomes at issue in this lawsuit. Further, the Plaintiff Waverly at Hamlin Plantation provided no evidence by way of deed or otherwise that indicated that they held ownership in the common areas. The only evidence indicating a warranty was made by Stephen Denby, as class representative of the class action lawsuit. The Plaintiff Waverly at Hamlin Plantation offered no evidence to prove that an express warranty had been extended to the HOA as well as the individual homeowners. Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to the Plaintiff Waverly at Hamlin Plantation's cause of action of Breach of Warranty is granted.

D. Negligent Misrepresentation

Finally, the Court grants Defendant John Wieland Homes' Motion for Directed Verdict as to the Plaintiff Waverly at Hamlin Plantation's cause of action for negligent misrepresentation. "To state a claim for negligent misrepresentation, the plaintiff must allege (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation." *Hurst v. Sandy*, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997).

In the present case, Plaintiff presented insufficient evidence to support a finding that Defendant John Wieland Homes negligently misrepresented the building of the townhomes.

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There is no evidence set forth in the record to support a finding that Defendant John Wieland Homes made false representations to the Plaintiff Waverly at Hamlin Plantation. Further, even if there were representations made by Defendant John Wieland Homes, there is no evidence in the record to support a finding that the Plaintiffs relied on these representations. Accordingly, because the Plaintiff failed to provide sufficient evidence to justify a cause of action of negligent representation against Defendant John Wieland Homes, Defendant's Motion for Directed Verdict is granted.

E. Negligence and Breach of Fiduciary Duty

As to the remaining causes of actions, Negligence and Breach of Fiduciary Duty, this Court finds that there exists sufficient evidence in the record to deny Defendant John Wieland Homes' Motion for Directed Verdict. Plaintiffs produced evidence sufficient to create a factual question for the jury as to Defendant John Wieland Homes' liability concerning the cause of action of Negligence and Breach of Fiduciary Duty. As such, Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiffs' causes of action of Negligence and Breach of Fiduciary Duty are denied.

Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc., is hereby GRANTED in part and DENIED in part.

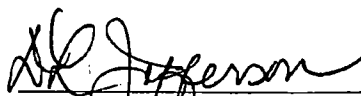
CONCLUSION

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT Defendants' Motions for Direct Verdict as to the class action suit is hereby granted with respect to all causes of action except Negligence and Breach of Warranty; and

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IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Defendants' Motions for Directed Verdict as to the Plaintiff Waverly at Hamlin Plantation is hereby granted with respect to all causes of action except Negligence and Breach of Fiduciary Duty.

AND IT IS SO ORDERED.



Hon. Deadra C. Jefferson
Presiding Judge
Ninth Judicial Circuit

March 24, 2017
Charleston, SC

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Stephen Denby, et al.,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

ORDER GRANTING DIRECTED VERDICT AS TO CERTAIN CAUSES OF ACTION

IN THE COURT OF COMMON PLEAS

C/A No.: 2014-CP-10-4335

FILED
2017 MAR 24 PM 1:12
JULIE J. ARMSTRONG
CLERK OF COURT

Presiding Judge:
Counsel for Plaintiff:

Counsel for John Wieland Homes:

Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
John Hayes, IV, Esq.
I. Keith McCarty, Esq.
Mary Margaret Noland, Esq.
Theodore Manos, Esq.
Andrew Haselden, Esq.
Justin Novak, Esq.
January 26, 2016
Phyllis Norton

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THIS MATTER came before the Court for a consolidated trial by jury on January 23-30, 2017. Present at the trial were John Hayes, Esquire, Mary Margaret Noland, Esquire and I. Keith McCarty, Esquire, representing the Plaintiffs, and Theodore Manos, Esquire, Justin Novak, Esquire and Andrew Haselden, Esquire, representing Defendant John Wieland Homes. At the close of Plaintiffs' case on January 25, 2017, this matter came before the Court, pursuant to Rule 50 of the South Carolina Rules of Civil Procedure, on a Motion for Directed Verdict by the Defendant John Wieland Homes as to various causes of action asserted by Plaintiffs. Viewing the evidence and all reasonable inferences in the light most favorable to the Plaintiffs, the Defendant John Wieland Homes' Motion for Directed Verdict is hereby granted in part and denied in part.¹

INTRODUCTION

In their amended pleadings, Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc. asserted six (6) causes of action against Defendant John Wieland Homes.² The class action suit involving Stephen Denby as class representative asserted fourteen (14) causes of action against Defendant John Wieland Homes.³ However, during the trial and prior to

¹ At the time of the motion the Court ruled contemporaneously indicating that a formal Order would be submitted by the Court.

² Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc. pled the following causes of action against Defendants John Wieland Homes in their Amended Summons and Complaint, filed December 19, 2014: (1) Unfair Trade Practices; (2) Breach of Implied Warranty of Fitness of Habitability; (3) Breach of Implied Warranty of Fitness for Particular Purpose; (4) Negligence; (5) Breach of Contract; and (6) Breach of Fiduciary Duty.

³ The class action suit, involving Stephen Denby as class representative pled the following causes of action against Defendant John Wieland Homes in their Amended Summons and Complaint, filed March 4, 2015: (1) Negligence, Professional Negligence, and Gross Negligence; (2) Negligent Misrepresentation; (3) Breach of Implied Warranty; (4) Breach of Implied Warranty of Fitness of Habitability; (5) Breach of Implied Warranty of Fitness for a Particular Purpose; (6) Breach of Implied Warranties as to the Project's Development and Construction; (7) Individual Liability as to the Developer Defendants; (8) Violation of the S.C. Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq.*; (9) Breach of Fiduciary Duty by Initial Board Members of the Waverly at Hamlin Plantation Townhome Association, Inc.; (10) Breach of Fiduciary Duty; (11) Breach of Contract; (12) Violation of the Residential Property Condition Disclosure Act; (13) Strict Liability; and (14) Alter Ego Liability and Piercing the Corporate Veil.

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Defendant John Wieland Homes' Motion for Directed Verdicts, Plaintiffs stated, on the record, that they were only proceeding on the following causes of action:

- Denby:
- (1) Negligence;
 - (2) Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing;
 - (3) Breach of Warranty;
 - (4) Violation of the South Carolina Unfair Trade Practices Act;
 - (5) Breach of Fiduciary Duty; and
 - (6) Negligent Misrepresentation.

- Waverly:
- (1) Negligence;
 - (2) Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing;
 - (3) Breach of Warranty;
 - (4) Violation of the South Carolina Unfair Trade Practices Act;
 - (5) Breach of Fiduciary Duty; and
 - (6) Negligent Misrepresentation.

STANDARD OF REVIEW

Pursuant to Rule 50(a) of the South Carolina Rules of Civil Procedure, a trial court may, upon a motion by a party at the close of evidence offered by the party's opponent, direct a verdict if the case presents only questions of law. When considering a party's Rule 50, SCRPC, motion for directed verdict, the trial court must view the evidence and any reasonable inferences therefrom in the light most favorable to the nonmoving party. *Eadie v. Krause*, 381 S.C. 55, 57, 671 S.E.2d 389, 390 (Ct. App. 2010); *Law v. S.C. Dep't of Corrs.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Cutchin v. South Carolina Dept. of Highways & Public Transportation*, 301 S.C. 35, 389 S.E.2d 646 (1990). The court cannot ignore facts unfavorable to the nonmoving party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts. *Hopson v. Clary*, 321 S.C. 312, 468 S.E.3d 305 (Ct. App. 1996); *Haulbrooks v. Overton*, 295 S.C. 380, 368 S.E.2d 676 (Ct. App. 1988). A jury issue is not created where the evidence taken as a whole is susceptible to only one reasonable inference.

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Hopson, 321 S.C. at 314, 468 S.E.2d at 307; *Whelan v. Welch*, 304 S.C. 548, 405 S.E.2d 836 (Ct. App. 1991). "It is not the province of the court to weigh the testimony, but simply to determine if there is any relevant, competent testimony reasonably tending to establish the material elements of plaintiff's cause of action." *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965). "If more than one reasonable inference can be drawn . . . the case should be submitted to the jury." *Id.*

LEGAL ANALYSIS

I. Defendant John Wieland Homes' Motion for Directed Verdict in the class action suit involving Stephen Denby as class representative is granted in part and denied in part.

After considering the arguments of counsel and the evidence presented, the Court grants Defendant's Motion for Directed Verdict in the class action suit involving Stephen Denby as class representative as to the following causes of action: (1) Breach of Implied Warranties of Habitability, Workmanlike Service, Fitness for a Particular Purpose, and Good Faith and Fair Dealing; (2) Violation of the South Carolina Unfair Trade Practices Act; (3) Breach of Fiduciary Duty; and (4) Negligent Misrepresentation. Further, the Court denies Defendant's Motion for Directed Verdict as to the following causes of action: (1) Negligence; and (2) Breach of Warranty.

A. Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing

Although not originally pled in Plaintiff's Complaint,⁴ Plaintiff's claims against Defendant John Wieland Homes concerning Breach of Implied Warranties were pled during the

⁴ Plaintiff's Amended Summons and Complaint, filed March 4, 2015, raises the following causes of action concerning Implied Warranties: Breach of Implied Warranty; Breach of Implied Warranty of Fitness of Habitability; Breach of Implied Warranty of Fitness for Particular Purpose; and Breach of Implied Warranties as to the Project's Development and Construction. However, during the trial, Counsel stipulated that the underlying causes of action actually pled by the Plaintiffs were better characterized as follows: Breach of

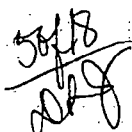
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proceedings as follows: Breach of Implied Warranty of Habitability, Workmanlike Service, Fitness for a Particular Purpose, and Good Faith and Fair Dealing.

The Implied Warranty of Workmanlike Service states that "[a] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008). This warranty is separate and distinct from the warranty of habitability. "In a sale of a new house by a builder who is also the seller, there is both an implied warranty that the house was built in a reasonably workmanlike manner and an implied warranty that the house is reasonably suitable for habitation." 17 S.C. Jur. Construction Law § 54 (citing, *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S. C. 335, 384 S. E. 2d 730 (1989)). "To establish a claim for breach of an implied warranty of workmanlike services, a plaintiff must show that the builder failed to perform its work in a careful, diligent, and workmanlike manner." *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). "An implied warranty of workmanlike service extends not only to the original purchasers of the home, with whom the builder is in privity, but to subsequent purchasers who may pursue a cause of action in contract or tort against a builder *for a reasonable period after the home's construction.*" *Fields v. J. Haynes Waters Builders, Inc.*, 658 S.E.2d 80 (S.C. 2008)(emphasis added).

In contrast, the Implied Warranty of Habitability is synonymous with the Implied Warranty of Fitness for its Intended Use, and concerns the sale of new homes. A builder/vendor of a new house gives his purchaser an implied warranty that the house is fit for its intended use. *See, Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976). *Kennedy v. Columbia*

Implied Warranty of Habitability, Breach of Implied Warranty of Fitness for Particular Purpose, and Breach of Implied Warranty of Workmanlike Service and Good Faith and Fair Dealing.



Lumber and Manufacturing Company, Inc. makes clear that Implied Warranty of Habitability springs from the sale of a new home. 299 S.C. 335, 384 S.E.2d 730 (1989) ("the warranty of habitability arises or springs from the sale of the home").

The causes of action concerning the Implied Warranties are inapplicable to the class action Plaintiffs. The Implied Warranty of Habitability pled by Plaintiffs concerns the construction of new homes. Additionally, this type of warranty focuses on the transaction of the new homes sold to the homeowners. In the present case, Plaintiffs provided no evidence that the homes were purchased from the builder/vendor nor did Plaintiffs provide evidence that the homes were built recently. In fact, the construction of the homes commenced over ten (10) years ago. As such, Plaintiffs' claim for Breach of Implied Warranty of Habitability fails.

Similarly, Plaintiffs' cause of action for Breach of Workmanlike Service also fails. This cause of action allows subsequent purchasers to bring suit against a builder even in the absence of contractual privity. However, this cause of action must be brought within a reasonable period after the construction of the new home. The construction of the class action Plaintiffs' homes occurred over ten (10) years ago. As such, the Implied Warranty of Workmanlike Service is untimely as it was not brought within a reasonable time period. Further the record is void of any testimony regarding any sales transactions of the residences.

Finally, there exists no Implied Warranty of Good Faith and Fair Dealing. In every contract, there exists an implied covenant of good faith and fair dealing. *Time Warner Cable v. Condo Services, Inc.*, 381 S.C. 275, 672 S.E.2d 816 (Ct. App. 2009). However, this cause of action is not separate and distinct from a claim for breach of contract as it must be treated as merely another term of the contract at issue. *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004). Accordingly, as Plaintiffs did not bring a cause of

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action for Breach of Contract, Defendant John Wieland Homes' Motion for Directed Verdict is granted as to the Implied Warranty of Good Faith and Fair Dealing.

Finally, the record is devoid of any evidence supporting the Plaintiffs' claims concerning Breach of Implied Warranties as the Plaintiffs failed to produce any evidence to support this cause of action. The evidence and testimony provided by Plaintiffs in their case in chief is pled as a Negligence cause of action rather than an Implied Warranties cause of action. Accordingly, Defendant John Wieland Homes Motion for Directed Verdict as to the class action Plaintiffs' cause of action for Breach of Implied Warranties is granted while their Motion for Directed Verdict as to the Negligence cause of action is denied.

B. Violation of the South Carolina Unfair Trade Practices Act

The Plaintiffs' cause of action for Violation of the South Carolina Unfair Trade Practices Act also fails. Section 39-5-20 of the South Carolina Code of Laws outlines the South Carolina Unfair Trade Practices Act and states that "any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." To prevail in a SCUPTA claim,

[p]laintiffs must allege and prove that the defendant's actions adversely affected the public interest. . . An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.

Singleton v. Stokes Motors, Inc., 358 S.C. 369, 595 S.E.2d 461 (2004). "Plaintiffs . . . generally have shown potential for repetition in two ways: (1) by showing the same kind of actions

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occurred in the past, thus making it likely they will continue to occur absent deterrence . . . or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 43-44, 664 S.E.2d 83, 89 (Ct. App. 2008) (quoting, *Daisy Outdoor Adver. Co., Inc. v. Abbott*, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996)).

In the present case, Plaintiffs provided no testimony or evidence to prove that Defendant John Wieland Homes' actions affected the public interest. There was neither evidence presented showing the same kind of actions occurring in the past nor was there evidence presented that Defendant John Wieland Homes' company procedures created a potential for repetition of the unfair and deceptive acts.

Furthermore, pursuant to the SCUPTA statute, a class may not maintain an action under the statute. *See, Dema v. Tenet Physician Servs-Hilton Head, Inc.*, 383 S.C. 115, 122, 678 S.E.2d 430, 434 (2009) ("SCUPTA claims may not be maintained in a class action law suit"). Accordingly, the class action suit involving Stephen Denby as class representative's cause of action of a Violation of the South Carolina Unfair Trade Practices Act, must be denied on these grounds as well.

For these reasons stated herein, the Court grants Defendant John Wieland Homes' Motion for Directed Verdict as to the class action Plaintiffs cause of action of Violation of the South Carolina Unfair Trade Practices Act.

C. Breach of Fiduciary Duty

Defendant John Wieland Homes' Motion for Directed Verdict as to the class action Plaintiffs' cause of action concerning breach of fiduciary duty is granted. "A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and

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... fidelity of another. . . . A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence." *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004). "Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003). With regards to builders' duties, "[a] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008).

Accordingly, there is evidence in the record to support the finding that Defendant John Wieland Homes owed Plaintiffs a duty to perform the building of the townhomes in a careful, diligent, workmanlike manner. However, there is insufficient evidence to conclude that this duty rose to the level of a fiduciary duty. Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to the class action Plaintiff's cause of action of breach of Fiduciary Duty is granted.

D. Negligent Misrepresentation

Defendant John Wieland Homes' Motion for Directed Verdict as to the class action Plaintiffs' cause of action for Negligent Misrepresentation is granted. "To state a claim for negligent misrepresentation, the plaintiff must allege (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff



justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation." *Hurst v. Sandy*, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997).

In the present case, the Plaintiffs presented insufficient evidence to support a finding that Defendant John Wieland Homes negligently misrepresented the building of the townhomes. There is no evidence set forth in the record to support a finding that Defendant John Wieland Homes made representations to the class action Plaintiffs. Further, even if there were representations made by Defendant John Wieland Homes, there is no evidence in the record to support a finding that the class action Plaintiffs relied on these representations in purchasing their townhomes. Accordingly, because the class action Plaintiffs failed to provide sufficient evidence to justify a cause of action of negligent representation against Defendant John Wieland Homes, Defendant's Motion for Directed Verdict is granted.

E. Negligence and Breach of Warranty

As to the remaining causes of actions, Negligence and Breach of Warranty, this Court finds that there exists sufficient evidence in the record to deny Defendant John Wieland Homes' Motion for Directed Verdict. Plaintiffs produced evidence sufficient to create a factual question for the jury as to Defendant John Wieland Homes' liability concerning the cause of action of Negligence and Breach of Warranty. As such, Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiffs' causes of action of Negligence and Breach of Warranty are denied.

Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to the class action suit brought by Plaintiff Stephen Denby, as class representative, is hereby GRANTED in part and DENIED in part.

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II. Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiff Waverly Townhome Association, Inc. is granted in part and denied in part.

After considering the arguments of counsel and the evidence presented, the Court grants Defendant's Motion for Directed Verdict as to Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc.'s for the following causes of action: 1) Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing; (2) Violation of the South Carolina Unfair Trade Practices Act; (3) Breach of Warranty; and (4) Negligent Misrepresentation. However, the Court finds that directed verdicts would not be appropriate for the remaining causes of action of both Breach of Fiduciary Duty and Negligence.

A. Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing

Although not originally pled in Plaintiff Waverly at Hamlin Plantation's Complaint,⁵ Plaintiff's claims against Defendant John Wieland Homes' concerning Breach of Implied Warranties were pled during the proceedings as follows: Breach of Implied Warranty of Habitability, Workmanlike Service, Fitness for a Particular Purpose, and Good Faith and Fair Dealing.

The Implied Warranty of Workmanlike Service states that "[a] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008). This warranty is separate and distinct from the warranty of habitability. "In a sale of a new house by a builder who is also the seller, there is both an implied warranty that the house

⁵ The Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc.'s Amended Summons and Complaint, filed December 19, 2014, raises the following causes of action concerning implied warranties: Breach of Implied Warranty of Fitness of Habitability and Breach of Implied Warranty of Fitness for Particular Purpose. However, during the trial, Counsel stipulated that the underlying causes of action actually pled by the Waverly Plaintiffs were better characterized as follows: Breach of Implied Warranty of Habitability, Breach of Implied Warranty of Fitness for Particular Purpose, and Breach of Implied Warranty of Workmanlike Service and Good Faith and Fair Dealing.

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was built in a reasonably workmanlike manner and an implied warranty that the house is reasonably suitable for habitation." 17 S.C. Jur. Construction Law § 54 (citing, *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S. C. 335, 384 S. E. 2d 730 (1989). "To establish a claim for breach of an implied warranty of workmanlike services, a plaintiff must show that the builder failed to perform its work in a careful, diligent, and workmanlike manner." *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). "An implied warranty of workmanlike service extends not only to the original purchasers of the home, with whom the builder is in privity, but to subsequent purchasers who may pursue a cause of action in contract or tort against a builder *for a reasonable period after the home's construction.*" *Fields v. J. Haynes Waters Builders, Inc.*, 658 S.E.2d 80 (S.C. 2008)(emphasis added).

In contrast, the Implied Warranty of Habitability is synonymous with the Implied Warranty of Fitness for its Intended Use, and concerns the sale of new homes. A builder/vendor of a new house gives his purchaser an implied warranty that the house is fit for its intended use. *See, Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976). *Kennedy v. Columbia Lumber and Manufacturing Company, Inc.* makes clear that Implied Warranty of Habitability springs from the sale of a new home. 299 S.C. 335, 384 S.E.2d 730 (1989) ("the warranty of habitability arises or springs from the sale of the home").

The causes of action concerning the Implied Warranties are inapplicable to the class action Plaintiffs. The Implied Warranty of Habitability pled by Plaintiffs concerns the construction of new homes. Additionally, this type of warranty focuses on the transaction of the new homes being sold to the homeowners. In the present case, Plaintiffs provided no evidence that the homes were purchased from the builder/vendor nor did Plaintiffs provide evidence that

the homes were built recently. In fact, the construction of the homes commenced over ten (10) years ago. As such, Plaintiffs' claim for Breach of Implied Warranty of Habitability fails.

Similarly, Plaintiff's cause of action for Breach of Workmanlike Service also fails. This cause of action allows subsequent purchasers to bring suit against a builder even in the absence of contractual privity. However, this cause of action must be brought within a reasonable period after the construction of the new home. The construction of the class action Plaintiffs' homes occurred over ten (10) years ago. As such, the Implied Warranty of Workmanlike Service is untimely as it was not brought within a reasonable time period.

Finally, there exists no Implied Warranty of Good Faith and Fair Dealing. In every contract, there exists an implied covenant of good faith and fair dealing. *Time Warner Cable v. Condo Services, Inc.*, 381 S.C. 275, 672 S.E.2d 816 (Ct. App. 2009). However, this cause of action is not separate and distinct from a claim for breach of contract as it must be treated as merely another term of the contract at issue. *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004). Accordingly, as Plaintiffs did not bring a cause of action for Breach of Contract, Defendant John Wieland Homes' Motion for Directed Verdict is granted as to the Implied Warranty of Good Faith and Fair Dealing.

Finally, the record is devoid of any evidence to support the Plaintiff's claims concerning Breach of Implied Warranties as the Plaintiff failed to produce any evidence to support this cause of action. The evidence and testimony provided by Plaintiffs in their case in chief is pled as a Negligence cause of action rather than an Implied Warranties cause of action. Accordingly, Defendant John Wieland Homes Motion for Directed Verdict as to the Plaintiff Waverly at Hamlin Plantation's cause of action for Breach of Implied Warranties is granted while their Motion for Directed Verdict as to the Negligence cause of action is denied.

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B. Violation of the South Carolina Unfair Trade Practices Act

Plaintiff Waverly at Hamlin Plantation's cause of action for Violation of the South Carolina Unfair Trade Practices Act also fails. Section 39-5-20 of the South Carolina Code of Laws outlines the South Carolina Unfair Trade Practices Act and states that "any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." To prevail in a SCUPTA claim,

[p]laintiffs must allege and prove that the defendant's actions adversely affected the public interest. . . An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.

Singleton v. Stokes Motors, Inc., 358 S.C. 369, 595 S.E.2d 461 (2004). "Plaintiffs . . . generally have shown potential for repetition in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence . . . or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 43-44, 664 S.E.2d 83, 89 (Ct. App. 2008) (quoting, *Daisy Outdoor Adver. Co., Inc. v. Abbott*, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996)).

In the present case, Plaintiff provided no testimony or evidence to prove that Defendant John Wieland Homes' actions affected the public interest. There was neither evidence presented showing the same kind of actions occurring in the past nor was there evidence presented that Defendant John Wieland Homes' company procedures created a potential for repetition of the

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unfair and deceptive acts. Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiff Waverly at Hamlin Plantation's cause of action for Violation of the South Carolina Unfair Trade Practices Act is granted.

C. Breach of Warranty

Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiff Waverly at Hamlin Plantation's cause of action for Breach of Warranty is granted. "A warranty is created when the seller makes an affirmation with respect to the thing to be sold with the intention that the buyer shall rely on it in making the purchase." *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 284 (Ct. App. 1993); *See also, Roland v. Heritage Litchfield, Inc.*, 372 S.C. 161, 641 S.E.2d 465 (Ct. App. 2007). "An action for breach of warranty requires the existence of an express or implied warranty as described in sections 36-2-313 and 36-2-314, respectively." *Herring v. Home Depot, Inc.*, 350 S.C. 373, 379, 565 S.E.2d 773, 776 (Ct. App. 2002). With regards to an express warranty, S.C. Code § 36-2-313 states;

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise, including those on containers or labels, made by the seller to the buyer, whether directly or indirectly, which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

S.C. Code § 36-3-213.

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Accordingly, Plaintiff Waverly at Hamlin Plantation produced insufficient evidence to conclude that a warranty was made on behalf of Defendant John Wieland Homes to the Plaintiffs. Unlike the class action suit, the Waverly Townhome Association did not purchase the townhomes at issue in this lawsuit. Further, the Plaintiff Waverly at Hamlin Plantation provided no evidence by way of deed or otherwise that indicated that they held ownership in the common areas. The only evidence indicating a warranty was made by Stephen Denby, as class representative of the class action lawsuit. The Plaintiff Waverly at Hamlin Plantation offered no evidence to prove that an express warranty had been extended to the HOA as well as the individual homeowners. Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to the Plaintiff Waverly at Hamlin Plantation's cause of action of Breach of Warranty is granted.

D. Negligent Misrepresentation

Finally, the Court grants Defendant John Wieland Homes' Motion for Directed Verdict as to the Plaintiff Waverly at Hamlin Plantation's cause of action for negligent misrepresentation. "To state a claim for negligent misrepresentation, the plaintiff must allege (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation." *Hurst v. Sandy*, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997).

In the present case, Plaintiff presented insufficient evidence to support a finding that Defendant John Wieland Homes negligently misrepresented the building of the townhomes.

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There is no evidence set forth in the record to support a finding that Defendant John Wieland Homes made false representations to the Plaintiff Waverly at Hamlin Plantation. Further, even if there were representations made by Defendant John Wieland Homes, there is no evidence in the record to support a finding that the Plaintiffs relied on these representations. Accordingly, because the Plaintiff failed to provide sufficient evidence to justify a cause of action of negligent representation against Defendant John Wieland Homes, Defendant's Motion for Directed Verdict is granted.

E. Negligence and Breach of Fiduciary Duty

As to the remaining causes of actions, Negligence and Breach of Fiduciary Duty, this Court finds that there exists sufficient evidence in the record to deny Defendant John Wieland Homes' Motion for Directed Verdict. Plaintiffs produced evidence sufficient to create a factual question for the jury as to Defendant John Wieland Homes' liability concerning the cause of action of Negligence and Breach of Fiduciary Duty. As such, Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiffs' causes of action of Negligence and Breach of Fiduciary Duty are denied.

Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc., is hereby GRANTED in part and DENIED in part.

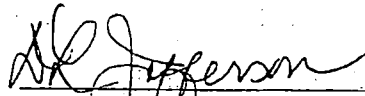
CONCLUSION

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT Defendants' Motions for Direct Verdict as to the class action suit is hereby granted with respect to all causes of action except Negligence and Breach of Warranty; and

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IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Defendants' Motions for Directed Verdict as to the Plaintiff Waverly at Hamlin Plantation is hereby granted with respect to all causes of action except Negligence and Breach of Fiduciary Duty.

AND IT IS SO ORDERED.



Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

March 24, 2017
Charleston, SC

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-3326
Case No. 2014-CP-10-4335
Appellate Case No. 2017-000542

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APR 28 2017

SC Court of Appeals

Waverly at Hamlin Plantation Townhome Association,
Inc.,

Plaintiff,

v.

John Wieland Homes and Neighborhoods of the
Carolinas, Inc. as Successor by Statutory Merger to
John Wieland Homes and Neighborhoods of South
Carolina, Inc., John Wieland Homes of Charleston, Inc.,
John Wieland Homes, Inc.,

Defendants,

And

John Wieland Homes and Neighborhoods of the
Carolinas, Inc., as Successor by Statutory Merger to
John Wieland Homes and Neighborhoods of South
Carolina, Inc., John Wieland Homes of Charleston, Inc.,
John Wieland Homes Inc., Builders Support Services
of the Carolinas, Inc.,

*Third-Party
Plaintiffs,*

v.

Barr Construction, Inc. Benjamin Mora d/b/a Mora
Construction, a/k/a Benjamin Mora Construction,
LLC, Builders FirstSource, Inc., a/k/a Builders
FirstSource-Southeast Group, LLC, a/k/a Builders
FirstSource-Atlantic Group, LLC, DBC Construction
Services, LLC, Eli, Inc, Gerardo Rosette Sanchez a/k/a
GR Painting, Jeorge Medina, Jeorge Medina a/k/a JMC
Construction, LLC a/k/a JMC Construction, Inc., Jesus
Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan
Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez
Brothers Painting, Latitude Construction Services,

LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC,

*Third-Party
Defendants,*

Of whom

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., is the

Appellant,

And

Waverly at Hamlin Plantation Townhome Association, Inc., George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, and The Muhler Company, Inc., are

Respondents.

And

Jeffrey Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephani Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Maryann Walsh, Patty Whitmire, Donald L. Tomasello and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan S. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Waters, James and Andrea Lowry, R. Robinson, Jr. Thaddeus R. and Barbara A. Kuczynski, Beverly Sunders Carlson, Lisa Roeck, Elizabeth Jackson, Charles and Mary Kathleen Jenkins, Linda M. and Earl K. Rigler, Jr., John Twomey, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Carol and Chris Gillespie, Jared D. Overcash,

Plaintiffs,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a Jon Wieland Homes and Neighborhoods, Inc., Bar Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builder's Firstsource, Inc. a/k/a Builders Firstsource-Atlantic Group, LLC, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medine a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasque, Richard Ditullio, Richard Ditullio a/k/a ROT Contracting, LLC,

Defendants,

Of whom

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., is the

Appellant.

And

Jeffrey Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephani Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Maryann Walsh, Patty Whitmire, Donald L. Tomasello and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan S. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Waters, James and Andrea Lowry, R. Robinson, Jr. Thaddeus R. and Barbara A. Kuczynski, Beverly Sunders Carlson, Lisa Roeck, Elizabeth Jackson, Charles and Mary Kathleen

Jenkins, Linda M. and Earl K. Rigler, Jr., John Twomey, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Carol and Chris Gilespe, Jared D. Overcash, Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, and The Muhler Company, Inc., are the

Respondents.

PROOF OF SERVICE

I, the undersigned employee of Howser Newman & Besley, LLC, hereby certify that pursuant to Rules 240(d) and 262(b), SCACR, I have served the *Motion to Supplement the Record of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc.* in this matter on all counsel of record and pro se parties by delivering a copy or mailing a copy, United States Mail, postage prepaid, on April 26, 2017, to the following addresses:

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April 26, 2017



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April 26, 2017

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< Certified Circuit Court Mediator
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† Certified Circuit Court Arbitrator
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‡ Also Admitted in Maryland

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APR 28 2017

SC Court of Appeals

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

RE: *Waverly at Hamlin Plantation Townhome Association, Inc., Plaintiff, v. John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Defendants, and John Wieland Homes and Neighborhoods of the Carolinas, Inc., as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes Inc., Builders Support Services of the Carolinas, Inc., Third-Party Plaintiffs, v. Barr Construction, Inc. Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builders FirstSource, Inc., a/k/a Builders FirstSource-Southeast Group, LLC, a/k/a Builders FirstSource-Atlantic Group, LLC, DBC Construction Services, LLC, Eli, Inc, Gerardo Rosette Sanchez a/k/a GR Painting, George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC, Third-Party Defendants, of whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., is the Appellant, and Waverly at Hamlin Plantation Townhome Association, Inc., George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, and The Muhler Company, Inc., are Respondents. And Jeffrey Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephani Adili,*

Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Maryann Walsh, Patty Whitmire, Donald L. Tomasello and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan S. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Waters, James and Andrea Lowry, R. Robinson, Jr. Thaddeus R. and Barbara A. Kuczynski, Beverly Sanders Carlson, Lisa Roeck, Elizabeth Jackson, Charles and Mary Kathleen Jenkins, Linda M. and Earl K. Rigler, Jr., John Twomey, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Carol and Chris Gilespe, Jared D. Overcash, Plaintiffs, v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a Jon Wieland Homes and Neighborhoods, Inc., Bar Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builder's Firstsource, Inc. a/k/a Builders Firstsource-Atlantic Group, LLC, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, George Medine a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasque, Richard Ditullio, Richard Ditullio a/k/a ROT Contracting, LLC, Defendants, of whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., is the Appellant, and Jeffrey Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephani Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Maryann Walsh, Patty Whitmire, Donald L. Tomasello and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan S. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Waters, James and Andrea Lowry, R. Robinson, Jr. Thaddeus R. and Barbara A. Kuczynski, Beverly Sanders Carlson, Lisa Roeck, Elizabeth Jackson, Charles and Mary Kathleen Jenkins, Linda M. and Earl K. Rigler, Jr., John Twomey, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Carol and Chris Gilespe, Jared D. Overcash, George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction,

Inc., Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, and The Muhler Company, Inc., are Respondents.

Appellate Case No. 2017-000542

Dear Ms. Kitchings:

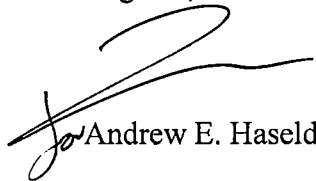
Please find enclosed for filing in the above-referenced matter:

- (1) an original and seven (7) copies of ***Motion to Supplement the Record of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc;***
- (2) an original and one (1) copy of the ***Proof of Service*** with respect to the motion; and
- (3) a check for the required filing fee of \$25.00.

After filing the original and six (6) copies of these documents, please return the extra clocked-in copies in the self-addressed, stamped envelope provided. By copy of this letter, I am serving all counsel of record and pro se respondents with copies of each of the above-described documents.

Thank you for your assistance in this matter. Please do not hesitate to contact me with any questions or concerns.

Regards,


Andrew E. Haselden

AEH/jnov

cc: All Counsel of Record and Pro Se Parties (w/ encls.)

HNB

**HOWSER, NEWMAN
& BESLEY, LLC**

Attorneys and Counselors at Law

215 East Bay Street, Suite 303
Charleston, SC 29401

RECEIVED

APR 28 2017

SC Court of Appeals

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