THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J. C. Nicholson, Jr.
Trial Court Case No.: 20089-CP-08-01068, 2009-CP-08-03916,
2009-CP-08-01413, 2008-CP-08-02714

Appellate Case No. 2014-002390

The Oaks at Rivers Edge Property Owners Association, Inc., John E. Atkinson, Joan D. Strandquist, Joseph E. Chiovarou, Jr., Peyton H. Cook, Jr., Brenda Cook, John W. Edelen, Karen A. Nelson, Robert J. Graham, Maureen S. Graham, Nancy K. Johnson As Trustee For The Nancy K. Johnson Revocable Trust, William Jung, Charles Maraziti, Patricia Maraziti, George S. Pollard, Eleanor J. Pollard, Robert Reece, Gerard M. Ruvo and Sue S. Ruvo as Trustees for the Ruvo 2006 Living Trust, Carolyn M. Jennings, Thomas Edward Keane, Edward Wallace Barr, III, Richard B. Pekruhn, Pauline Pekruhn, Matthew J. Severance, and Elizabeth Ashley Phillips Severance, Respondents,

v.

Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Appellants.

RESPONDENTS' RETURN TO PETITION FOR REHEARING

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SEP 14 2017
SC Court of Appeals

Respondents hereby submit this return to the Petition for Rehearing filed by Appellants in response to this Court's Order Affirming the decision of the Trial Court in this action. For the reasons stated herein, the Petition for Rehearing should be denied.

STANDARD FOR PETITION FOR REHEARING

A petition for rehearing must be made in accordance with Rule 240, SCACR, and must state with particularity the points that the Appellate Court supposedly overlooked or misapprehended. Rule 221(a), SCRCP; *see also* Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 564 S.E.2d 322 (2001). It is not the purpose of a petition for rehearing to try the action in the Appellate Court for a second time. Jean H. Toal, Amelia Waring Walker & Margaret E. Baker, *Appellate Practice in South Carolina* 391 (3d Ed. 2016) *citing* Kennedy, *supra*.

LEGAL ARGUMENT

I. This Court was correct in affirming the Trial Court's denial of Appellants' S.C. Code Ann. Section 15-38-50 motion to set off amounts received by the Respondents in prior settlements because the plain language of S.C. Code Ann. Section 15-38-50 does not allow for a set off and the Appellants had already received the benefit of the settlements prior to the trial of the action.

This issue was thoroughly briefed and argued before this Court. This Court did not misapprehend or overlook the issue of set off. *See* Opinion, p. 5-11.

There were two settlements prior to the trial of this action and prior to the judgment against the Appellants. *See* Exhibits P-1 through P-4 from the Post-Trial Motions Hearing[1]. The Appellants were parties to the settlements and have already received the benefits from both settlements, and, thus, are not entitled to a set-off. The

[1] Appellants moved to file these documents, included in the Respondent's Designation of Matter, under seal with this Court.

Window Defendant Settlement resulted in the removal from the claim asserted at trial an amount in excess of the settlement sum. *See* (R. pp. 2432-2450, Plaintiffs' Exhibit 180); *see also* (R. pp. 1877-1897, Plaintiffs' Exhibit 49). This settlement also resulted in the dismissal of cross-claims against the Appellants by other settling parties. With regard to the second settlement, Appellants were also parties to that settlement. Only a non-settling party may be entitled to a set-off. *See* Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct.App. 2012)(a "nonsettling" defendant may be entitled to a setoff). Appellants received the benefit of the second settlement in that certain causes of action were dismissed by Respondents against Appellants.

Accordingly, this Court was correct in holding: "Appellants have already received a reduction in claims as contemplated by section 15-38-50 of the South Carolina Code." Opinion, p. 10.

Likewise, this Court addressed and rejected the very argument that Appellant now again makes that the brick and stucco had to come off as a result of the window defects, and, as such, Appellants (notwithstanding the fact that they were parties to the settlement) are entitled to a set-off. This Court held as follows:

"Although Parker testified the stucco did not contribute to the leaking and all brick and stucco needed to come off because of the windows in part because brick is hard to match he did not evaluate the brick and stucco to determine if it was up to code or evaluate its workmanship. Parker indicated that when issues had originally arisen with the windows and doors and he had recommended replacing them, he only believed part of the brick needed to be replaced then. However, the trial court relied instead on Padgett's testimony and found all of the other defects in the construction necessitated the brick and stucco replacement."

Opinion, p. 11. The basis for this holding is found clearly in the record. Mr. Theodore Padgett, P.E. testified that the brick and stucco had to come off because of code

violations and defects in each without regard to the window issues. (R. pp. 1299-1301 (stucco); pp. 1309-1310 (brick), Testimony of Theodore Padgett, P.E. Trial Transcript).

This Court did not overlook or misapprehend the record. In fact, this Court specifically addressed the Appellants' argument and rejected it based upon evidence clearly in the record to support the Trial Court's findings.

II. This Court correctly affirmed the finding of the Trial Court awarding Unit Owners Damages for Loss of Market Access.

There is ample evidence in the record that the Unit Owners could not sell their units during the downturn in the housing market because of the defects. There is also ample evidence that the award of damages for loss of market access is not a double recovery. Mr. Christopher Donato was qualified as an expert appraiser without objection (in fact Appellants stipulated he was an expert appraiser). *See* (R. p. 1218, Testimony of Christopher Donato, Trial Transcript). Mr. Donato testified plainly as follows:

Q. All right. Now, let's talk about the people who still own the units. What is the analysis there?

A. The people who still own the units, they had sort of a barrier to the entry into the market. And the reason why they had this barrier is because they had to disclose all of the problems associated with this unit, so they were not capable of selling their property for market value. They had two horrible choices: one, ride the Titanic to the bottom, or, two sell at these extraordinary discounts to get the market interested in buying a piece of property with defects. So my analysis of their damage is the loss in value between the 2008 value without defects and the 2011 value without defects.

Q. Now in this instance, the truth, in fact, the market was going down.

A. It was.

Q. And so what you're saying is that notwithstanding the fact that the market was going down, they were denied entry into the market; is that correct?

A. They were denied access to market value.

(R. pp. 1227-1228 Testimony of Christopher Donato, Trial Transcript). Mr. Donato went on to testify with regard to the allegation of "double recovery" as follows:

Q. Mr. . Donato, will the opportunity that was lost by my clients in 2008 be returned to them when these units are fixed, if they ever are?

A. No, sir.

Q. So that opportunity, the ability to not lose 270,000, 330,000, whatever that number is, that train has pulled out of the station; correct?

A. Yes, sir. When you and I were feeling the effects of the current real estate recession, we had the opportunity to get out.

See (R. p. 1280, Testimony of Christopher Donato, Trial Transcript). Based upon this testimony and other evidence in the record, the Trial Court correctly found and this Court correctly affirmed the award of damages to the Individual Unit Owners. This Court did not misapprehend or overlook anything when it found as follows:

"Additionally, the trial court did not err in awarding Respondents damages for both loss of access to the market and the cost of repairs. The loss of market access damages accounted for the loss Unit Owners experienced in the value of their units due to the downturn in the housing market. Unless the housing market rebounded to the place where it was before the market crashed, the Unit Owners could not regain the money they lost because they were unable to sell due to the issues with their units and the subsequent litigation. If not for the problems with the units, the owners could have had the choice to sell their units before or during the crash. The record contains testimony from the Respondents' real estate appraisal expert—Christopher Donato—and the Unit Owners to that effect. The cost of repairs was simply the cost to place the buildings and units in the physical condition they should have been in when the Developer initially sold them—such as fully in compliance with building code requirements, without mold, without leaks, and not able to hear activities in other units. They suffered two separate injuries with two different sets of damages. Therefore, the award did not constitute a double recovery."

Opinion, p. 13.

III. This Court correctly affirmed the Trial Court's award of damages for repairs to the buildings to fix the sound problems.

The award for repairs to buildings for the sound problems was fully in line with

the evidence contained in the record in this matter. The necessity of repairs and the repair damage numbers were supported by the testimony and opinions of a licensed general contractor and a licensed professional engineer familiar with condominium construction in South Carolina.[2] The Appellants argue that there is no evidence that acoustical repairs will address the sound problems. This is simply an unfounded argument. Mr. Theodore Padgett, P.E. testified as follows:

Q. Do you have an opinion to a reasonable degree of engineering certainty, based on your thirty years of experience, whether or not this floor should have either been solid concrete or have Gyp-crete on it.

A. [****] This is the first condominium project I have ever seen that did not have a concrete floor top.

Q. The first?

A. The first. And I've been involved with probably 150 over the last twenty-eight years or so.

Q. And just out of curiosity, why would you want to put a concrete floor in a luxury condominium or, if you were too cheap to do that, at least put Gyp-crete on the floor? Why would you want to do that?

A. For sound. I mean, those floor toppings, Gyp-crete, light-weight concrete, are standard in this industry. And they even put this stuff in moderately-priced apartments. So you go to Kiawah, you go to the Isle of Palms, you always see—they always have floor toppings.

(R. pp. 1312-1313, Testimony of Theodore Padgett, P.E., Trial Transcript). Mr. Padgett went on to testify as follows:

Q. Let me ask you this. Do you have an opinion to a reasonable degree of engineering certainty whether or not the original design was adequate for soundproofing?

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[2] The Appellants again argue to this Court that the "sound proofing" meets the minimum building code requirements. This ignores the real issue. The issue is compliance with industry standards for this type of luxury condominium-not mere code compliance. It is axiomatic that the violation of an industry standard can give rise to a tort claim and damages. Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989).

A. **I don't believe it was, no.**

Q. Do you have an opinion to a reasonable degree of engineering certainty whether the remediation was adequate for adequate soundproofing?

A. **It was not.**

Q. Is it your opinion to a reasonable degree of engineering certainty that at a minimum, at a minimum, this condominium should have had a Gyp-crete floor and the appropriate acoustical hanging ceiling?

A. **Yes, sir.**

Q. And in your opinion, to a reasonable degree of engineering certainty, can that be achieved any way now other than what you have proposed in your fix?

A. **No, sir.**

(R. p. 1322, Testimony of Theodore Padgett, P.E., Trial Transcript).

Based upon this evidence and other evidence in the record, the Trial Court correctly found and this Court correctly affirmed the award of damages to repair sound problems and construction that was non-compliant with industry standards. This Court did not misapprehend nor overlook this evidence when it ruled as follows:

The record contains evidence to support the trial court's awarding damages to Respondents to correct the noise problem. Numerous Unit Owners testified tenants moved out because of the noise or that they themselves experience noise problems that interfered with their lives. Several Unit Owners provided that even after Appellants attempted to fix the sound problems, they continued to experience issues. Although Appellants' expert testified alterations to the ceiling had improved the sound problems, he acknowledged further improvements could be made by working on the floors. He simply believed it was not worth the cost to do that.

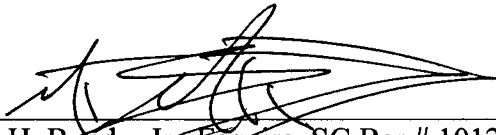
Opinion, p. 18.

CONCLUSION

For the reasons stated herein, the Court did not misapprehend or overlook the evidence in this case. The Appellants are not entitled to a rehearing, and the Petition should be denied.

Respectfully submitted,

BUNDY MCDONALD, LLC



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September 13, 2017
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v.

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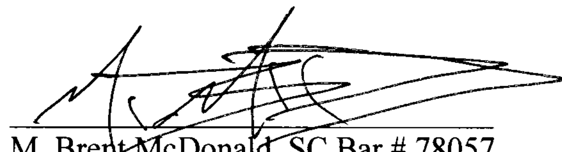
Proof of Service

I certify that I have served Respondents' Return to Petition for Rehearing on Appellants Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC by depositing a copy of the Return in the United States mail, postage prepaid, on September 13, 2017, addressed to Appellants' counsel of Record, Roy Maybank, Esquire, Amanda Maybank, Esquire, and Charles Altman, Esquire at the addresses shown below.



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September 13, 2017

Via FED-EX
The Honorable Jenny Abbott Kitchings
Clerk of Court – The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: The Oaks at Rivers Edge Property Owners Association, Inc., et.al., v .Daniel Island Riverside Developers, LLC and Carriage Hill Associates of Charleston, LLC, Appellant Case No.: 2014-002390

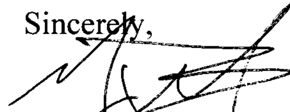
Dear Ms. Kitchings,

Enclosed for filing please find the original and six (6) copies of Respondents' Return to Petition For Rehearing. Also enclosed is Proof of Service of the same upon Appellants' counsel.

Please file the original and return a file stamped copy to us in the envelope enclosed for your convenience.

I thank you for your attention to this matter, and as always, please do not hesitate to call me should you require anything further.

Sincerely,



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