

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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.

Appellate Case No. 2014-002390

Appeal from Berkeley County
 J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5507
 Heard November 17, 2016 – Filed August 2, 2016

PETITION FOR REHEARING

TO: THE JUSTICES OF THE SOUTH CAROLINA COURT OF APPEALS

The Appellants, Daniel Island Riverside Developers, LLC, and Carriage Hill Associates of Charleston, LLC, (hereinafter “DIRD” and “CHAC”), by and through their undersigned attorneys, petition the South Carolina Court of Appeals for a Rehearing in the above-captioned matter. This petition is based upon the grounds as follows:

- I. THE ORDER MISAPPREHENDS THE FACT THAT THE REMOVAL OF THE EXTERIOR CLADDING WAS NECESSITATED BY THE WATER DAMAGE CAUSED BY THE IMPROPERLY MANUFACTURED AND INSTALLED WINDOWS. ACCORDINGLY, THE RESPONDENTS SHOULD HAVE BEEN ENTITLED TO A SET-OFF FROM THE AMOUNT PAID BY THE SETTLING WINDOW DEFENDANTS.**

There is evidence in the record that the brick and stucco installation were not contributing the water intrusion and damage, and that the exterior cladding was being removed only to access damage caused by water intrusion caused by the improperly manufactured and installed windows, as such, Appellants were entitled to a set-off of amounts paid to Respondents by the settling window manufacturer, window installer, and architects.

Michael Parker, PE, testified that he evaluated the stucco system, performed test cuts into the stucco to determine if there was any evidence that the stucco was contributing to the leakage and could not find any. (R.p.1556-line 24-R. 1557, line 3). Parker further testified that as part of his window investigation, he removed all the stucco except for three feet at the top of the roof to wall intersection, and did not find any leaks associated with the stucco. (R.p.1557, line 18-R.p. 1558, line 4; R.p.1563, lines 11-24).

In fact, both Parker and Padgett testified that performing a surgical repair on exterior cladding is very difficult due to the ability to properly match colors, and additionally, with stucco bonding the new and old materials together. Therefore, in order to effectuate the window repairs

and replacement the exterior sheathing would have to be removed. (R.p.1571, lines 21-25; p.1576, lines 16-23; R.p.1573, lines 11-16; R.p.1379, 22-24; R.p.1380, lines 6-12).

A settlement by a joint tortfeasor “reduces the claim against the others to the extent of any amount stipulated by the release or the covenant.” S.C. Code Ann. 15-38-50(1). Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury.” *Hawkins v. Pathology Assoc. of Greenville, PA*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998).

The window repair and replacement and the repair of the damage sheathing and framing caused by the windows, necessitated the removal of the exterior cladding. Accordingly, Respondents are entitled to a set-off from the settlement amount.

II. THE UNIT OWNERS FAILED TO MEET THEIR BURDEN OF PROOF TO RECOVER DAMAGES FOR “LOSS OF MARKET ACCESS.” MOREOVER, RECOVERY OF DAMAGES FOR BOTH REPAIR THE BUILDINGS FOR LOSS OF MARKET ACCESS CONSTITUTES A DOUBLE RECOVERY.

The Respondents were awarded damages for both the cost to repair the buildings as well as for “loss of market access.” “Loss of market access” was defined as damages attributed to the lost opportunity for the unit Owners to sell their units from 2008 to 2011. First, there is no recognized award or damage for lost of market access. Assuming there was such an award, the Respondents failed to meet their burden of proof to establish such damages.

“[I]n order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. While neither the existence, causation nor amount of damages can be left to conjecture, guess or

speculation, proof with mathematical certainty of the amount of loss or damage is not required.”

Whisenant v. James Isl. Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981).

In the present case, no testimony was presented by the unit owners of 1.) potential buyers who did not purchase the units due to construction defects; 2.) of real estate agents who incurred difficulty in selling the units due to the construction defects; 3.) no purchase offers, contracts of sale, listing agreements, listings, or loan applications were proffered as evidence at trial of “loss of market access.” The fact is, the real estate market took a massive hit due to the downturn in the economy at the time. All property owners and potential buyers across the county seeking to sell or buy real estate during that time period encountered difficulty with financing and ultimately closing on a property.

Second, if loss of market access damages are awarded, they constitute a double recovery as the Respondents have been awarded the cost to repair the buildings, which brings the units back to market value. To justify the loss of market access damages the opinion states that Appellants appraisal expert Donato testified that the construction defects caused a reduction in value of 30-40% of the units. However, it omits the testimony from Donato that the diminished value would revert back to market value once the repairs are completed. (R.p.1277, lines 1-10).

The valid measure of injury to a building is cost of repair or restoration, although compensation may be limited to the value of the building before the damage was inflicted. *Scott v. Fort Roofing & Sheet Metal Works, Inc.*, 299 S.C. 449, 385 S.E.2d 826 (S.C. 1989). In the absence of specific damages, the measure of damages to real property is diminution in value. *Joyner v. St. Matthews Builders*, 263 S.C. 136, 140, 208 S.E.2d 48, 50 (1974). Allowing recovery for both the cost of repairs and the diminution in value of the home prior to repairs

would amount to double recovery. *New. v. Mas G. Crosby Const. Co.*, Op. No. 2004-UP-282 (S.C. Ct. App. Filed April 27, 2004).

Appellants do not disagree that unit owners who presented evidence that they sold their units at a reduced price due to construction defects would be entitled to damages for the diminution in value they suffered at the sale. It follows that these unit owners who sold are not entitled to damages for cost of repair. Likewise, the unit owners that did not present any evidence of any lost sale due to the construction defects are not entitled to a loss of market access diminution in value award. These owners are still in possession of the asset, the unit. By their own expert's testimony, once the repairs are complete, the unit will revert to market value. In this situation, once the repaired unit is sold at current market value, the unit owner would have recovered twice, once for diminution in value and again upon the sale of the unit for market value.

III. THE ORDER MISAPPREHENDS THE FACT THAT THE DAMAGES AWARDED FOR SOUND REMEDIATION WAS NOT SUPPORTED BY THE EVIDENCE AT TRIAL.

The order relies on the testimony of Ted Padgett, PE, to justify an award for acoustic repairs in the amount of \$1,973,134.98. Despite the fact that Respondent's own acoustical expert found that the ASTC ratings exceeded the minimum building code and that any further repairs were unlikely to result in an increase in the ratings.

Lisa Schott of Quietly Making Noise, the Respondents acoustical expert, prepared a report which was produced at trial. (R.p.809, lines 2-12; R.p.2496. The report states in pertinent part:

The ASTC ratings exceeded the minimum building code requirements for both the original and modified floor/ceiling systems designs.

The FIIC rating with wood floor coverings was 41 for the original construction which falls below the minimum building code requirement. An increase of 8 points was realized for the modified construction, resulting in a FIIC rating of 49 which meets applicable criterion.

...

The design modifications have clearly made a significant improvement. The improvements to the ceiling are consistent with recommendations that the OMV [Quietly Making Noise] would have made and further changes to the ceiling design are unlikely to result in much for of an increase in the ratings.

(R.p.802, lines 210R.p.806, line 19; R. p.2504).

There was no evidence presented that the acoustical repairs would improve the current ratings or that the Respondents were going to perform further acoustical repairs. The testimony of Ted Padget, PE, relied upon in the opinion relates to what type of construction would be appropriate between the floors and the ceiling between apartments and not what should be done to remediate the sound.

The remediation recommendations to the Respondents were contained in their expert report of Lisa Schott of Quietly Making Noise, which specifically found that the current ratings of the units meet acceptable ratings and that further changes to the ceiling design are “unlikely to result in much of an increase in the ratings.”

Even the evidence cited by the opinion does not support an award for cost of repair to the acoustics, but rather seems to support an argument that repairs would not improve the acoustics:

“[Appellants’] expert provided that the impact sound measurements for the units were not up to the standard he would normally try to achieve. He acknowledged for the purchase price of the condos, he personally would want to live somewhere with a better impact sound rating. He also indicated the result was typical for a retrofit but not eh same quality as new construction would be. He also noted sound problems can never be eliminated from a wood frame building. He thought it was too expensive to put in

Gypcrete after the fact even though it should have been used initially. He specified the problem with sound transmitting through the floors was created by installing mats under the floors with nails, which should have never occurred. He thought the improvement in sound transmission after they made the sound remediation was substantial “under the circumstances.” He further admitted the sound remediation that was already done caused the ceiling height to be lower than it would have been if the remediation had been done another way

Likewise, the testimony cited in the opinion as to sound relate to the subsequent inconveniences and problems of the unit owners despite the sound remediation; tenants moving out because of the noise, noise problems that “interfered with their lives,” and continued noise problems.

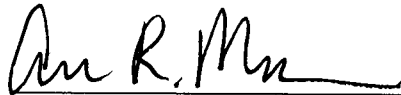
To the extent the unit owners are entitled to any award as to the acoustics, the proper measure would have been in a diminution in value award. Where there is a permanent injury to land, damages are based on the diminution in value of the property based on its value before the injury and after the injury. *Yadkin Brick Co. v. Materials Recovery Co.*, 339 S.C. 640, 645, 529 S.E.2d 764, 767 (Ct. App. 2000).

Here, while a cost to repair the acoustics was presented at trial, the evidence from both Respondents’ and Appellants’ experts was that the repair would not improve the sound conditions in the units. As such, there was no evidence to support the award of \$1,973,134.98 to conduct such a repair. The proper measure was a diminution of value calculation. Again, no evidence was presented at trial to establish any diminution in value of the units because of the alleged acoustical problems.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court grant its petition for rehearing.

Respectfully submitted:



Roy P. Maybank
Amanda R. Maybank
MAYBANK LAW FIRM, LLC
P.O. Box 12579
Charleston, SC 29422
843-766-8101 telephone
843-766-8103 facsimile

Charles. S. Altman
Meredith L. Coker
ALTMAN & COKER, LLC
575 King Street, Suite A
Charleston, SC 29403
843-853-9907 telephone
843-853-9838

Attorneys for Appellants

Charleston, South Carolina

September 7, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Stephanie P. McDonald, Circuit Court Judge

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 WALLACEBARR, III, RICHARD B. PEKRUHN, PAULINE
PEKRUHN, MATTHEW J. SEVERANCE, and ELIZABETH ASHLEY PHILLIPS
SEVERANCE,

Respondents

v.

DANIEL ISLAND RIVERSIDE DEVELOPERS, LLC, CARRIAGE HILL
ASSOCIATES OF CHARLESTON, LLC,

Appellants

PROOF OF SERVICE

I certify that I have served Appellants' Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on September 7 2017, addressed to W.H. Bundy, Jr. and M. Brent McDonald, Esquire, Bundy McDonald, LLC, 1516 Old Trolley Road, 2nd Floor, Summerville, SC 29485.



Amanda R. Maybank
MAYBANK LAW FIRM, LLC
P.O. Box 12579
Charleston, SC 29422
843-766-8101 telephone
843-766-8103 facsimile
amanda@maybanklaw.com
Attorneys for Appellants

MAYBANK LAW FIRM, LLC

ATTORNEYS AT LAW

Physical Address
531 Savannah Highway
Charleston, SC. 29407

Mailing Address
POST OFFICE BOX 12579
CHARLESTON, SC 29422

Roy P. Maybank
Amanda R. Maybank
Marshall Earhart

Phone: (843) 766-8101
Facsimile: (843) 766-8103

EMAIL: roy@maybanklaw.com

September 7, 2017

BY FEDERAL EXPRESS

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201



Re: The Oaks at River 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
MLF File No.: 131.001

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Appellants' Petition for Rehearing and Proof of Service.

Please file the original and six (6) copies of the motion and return one (1) clocked copy for our file. A self-addressed, prepaid envelope is provided for this purpose. Also enclosed is our firm's check in the amount of \$25.00 for the filing fee.

Warmest Regards, I remain

Yours truly,

Amanda R. Maybank

RPM/tgw
Enclosures

cc: Charles S. Altman, Esquire
Meredith L. Coker, Esquire
Walter H. Bundy, Esquire
Brent McDonald, Esquire