

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY

Court of Common Pleas

The Honorable Alexander S. Macaulay

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SC Court of Appeals

Appellate Case No. 2015-000392

Stoneledge at Lake Keowee Owner's Association, Inc.; C. Dan Carson; Jeffrey J. Dauler; Joan W. Davenport; Michael Furnari; Donna Furnari; Jessy B. Grasso; Nancy E. Grasso; Robert P. Hayes; Lucy H. Hayes; Ty Hix; Jennifer D. Hix; Paul W. Hund, III; Ruth E. Isaac; Michael D. Plourde; Mary Lou Plourde; Carol C. Pope; Steven B. Taylor; Bette J. Taylor; and Robert White, Individually and on behalf of all other similarly situated, Respondents,

v.

IMK Development Co., LLC, Keowee Townhouses, LLC; Ludwig Corporation, LLC; SDI Funding, LLC; Medallion at Keowee, LLC; Integrys Keowee Development, LLC; Marick Home Builders, LLC; Bostic Brothers Construction, Inc.; Miller/Player & Associates; Bradford D. Seckinger; John Ludwig; William Cox; Larry D. Lollis; Rick Thoennes; M Group Construction and Development, LLC; Mel Morris; Joe Bostic; Jeff Bostic; Clear View Construction, LLC; Michael Franz; MHC Contractors; Miguel Porras Choncoas; Builders First Source Southeast Group; Mike Green; Southern Concrete Specialties; Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises; Gunter Heating & Air; All Pro Heating; A/C & Refrigeration, LLC; Coleman Waterproofing; Heyward Electrical Services, Inc.; Tinsley Electrical, LLC; Hutch N Son Construction, Inc.; Upstate Utilities, Inc.; Southern Basements; Carl Catoe Construction, Inc.; T.G. Construction, LLC; Delfino Construction; Francisco Javier Zarate d/b/a Zarate Construction; Alejandro Avalos Cruz; Herberito Acros Hernandez; Martin Hernandez-Aviles; Francisco Villalobos Lopez; Ambrosio Marinez-Ramirez; Ester Moran Mentado; Socorro Castillo Montel; MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; Eufacio Garcia; Everado Jarmamillio; Garcia Parra Insulation, Inc.; J&J Construction; Jose Nino; Jose Manuel Garcia; Eason

Construction, Inc.; Vincent Morales d/b/a Morales Masonry and Miller/Player & Associates, Defendants

OF WHOM MARICK HOME BUILDERS, LLC AND RICK THOENNES ARE THE.....APPELLANTS

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES

1. Is there evidence to support the trial court's denial of Marick's Motion for Directed Verdict on Plaintiff's claim for Breach of the Implied Warranty of Workmanlike Service?
2. Were any of the trial court's charges or failures to charge erroneous or prejudicial and did Marick preserve those arguments for appeal?
3. Was the court's sustaining of an objection during closing erroneous and harmful and was it preserved for appeal?
4. Did the court properly deny Marick's Motion for Directed Verdict on the basis that proximate cause is a question of fact for the jury?
5. Did the court properly conclude that election of remedy was not required since the Plaintiff sought only one remedy?
6. Did the court correctly decide the issue of whether the verdict was cumulative and was that issue preserved for appeal?
7. Did the court correctly instruct the jury and apply the law relative to Plaintiff's breach of fiduciary claim?

STATEMENT OF THE CASE

Plaintiff Stoneledge at Lake Keowee Owners' Association, Inc. (HOA) instituted this construction defect lawsuit on May 29, 2009. The defendants were the developers, contractors, including Appellant Marick Builders and Rick Theonnes, and subcontractors responsible for the development, construction and sale of the units at Stoneledge and also the management of the HOA Board of Directors until September, 2008, when control was turned over to the owners.

On August 28, 2013, Judge Macaulay, upon the motion of certain subcontractor defendants, issued an Order for Separate Trials and Scheduling Order, which contemplated separate trials for Phase I and Phase II of the Project. (R. pp. 00001-00010). The basis of that order was that certain subcontractors were not involved in Phase 2, that different codes and even different law applied to the two phases, and that separate trials would prevent undue prejudice to certain subcontractors who performed work solely on one phase or the other. The Bifurcation Order set a Phase I trial to begin on October 28, 2013, and scheduled a Phase II trial to begin within a few months. (*Id.*)

The trial relating to the HOA's claims for Phase I began on October 28, 2013, and resulted in a jury verdict against Bostic Brothers in the amount of \$5,000,000. The trial judge determined the verdict was cumulative, and the jury was dismissed without objection. On November 8, 2013, the Court entered a Form 4 Order of Judgment. (R. p. 00024-00027). Bostic Brothers filed post-trial motions including a Motion for Judgment Notwithstanding the Verdict, a Motion requesting an Order granting a set-off, a Motion for a New Trial Absolute, pursuant to Rule 59, SCRPC, and a Motion for a New Trial Nisi Remittitur, also pursuant to Rule 59.

Plaintiff filed a Motion to Alter or Amend Judgment seeking to have the full amount of the cumulative judgment award, \$5,000,000, assigned to each of the causes of action. (R. pp. 00116-00141; R. pp. 00224-02331; Plaintiff's Motion¹). By letter dated November 25, 2013, Plaintiff clarified the prior settlement amounts (\$2,855,911.77) received from defendants for Phase I and asked that the full set-off be applied to each cause of action, reducing the amount awarded for each cause of action to \$2,144,088.23. (Letter to Judge Macaulay from Lyles dated November 25, 2013). No defendants objected to the amount of prior Phase I settlements as set forth in the letter.

Judge Macaulay presided over a hearing on all post-trial motions on April 10, 2014. (R. pp. 00106-00216). Defendants' motions were not ruled on until January 22, 2015, at which point they were denied. (R. pp. 00018-00021).

As requested in Plaintiff's Motion to Alter or Amend and letter dated November 25, 2013, the trial court entered a Form 4 Judgment filed January 30, 2015, amending its prior Form 4 Judgment filed November 8, 2013, and applying a set-off for the amounts recovered by the Plaintiff from the settling defendants. (R. pp. 00036-00038).

STATEMENT OF THE FACTS

This construction defect case arises from pervasive defects and resulting damage at an 80-unit townhome project on Lake Keowee in Oconee County ("Stoneledge" or the "Project"). The HOA is responsible for maintenance, repair and replacement of the building envelopes, roofs, porches and decks of the Stoneledge. (R. p. 00435, lines 6-11).

¹ The Record on Appeal does not contain the Plaintiff's Motion or the Letter to Judge Macaulay dated November 25, 2013. The Respondent designated both in Respondent's Designation of Matter dated May 13, 2016. Respondent plans to file a Motion to Supplement the Record.

Phase I consists of eight (8) buildings representing thirty-seven (37) individual units. Bostic Brothers Construction, Inc. (“Bostic Brothers”) served as the original general contractor and was also an owner of the development company, Keowee Townhomes, LLC. (R. p. 00850, lines 15-22). Bostic Brothers constructed and sold approximately 11 units and the remaining units were in various stages of completion when Bostic ceased construction and ultimately entered into bankruptcy. (R. p. 00632, lines 1-9; R. p. 00635, line 23-p.00636, line 2; R. p. 00683, line 12-p. 00684, line 11; R. p. 01365, line 12-20).

After Bostic left the project, on or about March 30, 2005 Keowee Townhomes, LLC sold the Project, including 25 unfinished units in Phase 1, to Defendant IMK Development, Co., LLC (“IMK”), a development company comprised of Defendants Marick Home Builders, LLC (“Marick”) and Integrys Keowee Development, LLC (“IK”). (R. p. 01323, line 13-p.1324 line 17). Marick assumed the role of general contractor, obtained new building permits on 25 partially completed units, and began work on Phase I in 2005. (R. p. 00715, line 3-p. 00716, line 15; R. p. 01362, line 3-p.1363, line 7; R. pp. 02738-02759). Rick Thoennes was the managing member and license holder for Marick. (R. p. 01355, lines 23-25). Rick Thoennes assigned Nathan Hornaday as the Superintendent for the Project. (R. p. 00680, line 7-14; R. p. 00685, line 1-p. 00694, line 19).

Marick and Thoennes performed extensive work at the project to complete the build-out of Phase I. (R. p. 00714, line 25-p. 00722, line 20; R. pp. 02738-02759). To complete the units in Phase I, Marick was required to pull a number of building permits. (R. p. 00680, line 7-p. 00682, line 25; R. p. 00685, line 1-p.00694, line 19; R. pp. 02738-

02759). On the building permits, Marick represented the nature of the work it was going to undertake and assigned a value to that work. (R. p. 00680, line 7-p. 00682, line 25; R. p. 00714, line 24-p. 00722, line 20; R. pp. 02738-02759). The descriptions of the work ranged from completion of the interior of certain units to completion of other units “from the foundation up,” and for various stages of work in between. (R. p. 00714, line 24-p. 00722, line 20; R. pp. 02738-02759). The value of the work to be performed pursuant to the permits, as estimated by Marick, was more than \$1.4 Million. (R. pp. 0738-02759; R. p. 00714, line 24-p. 00722, line 20; R. p. 01363, line 19-p. 01364, line 11). To pull the permits, Marick had to certify that the work it was going to perform would comply with applicable building codes and ordinances. (R. p. 00714, line 24-p. 00722, line 20).

Through his company, Marick, Thoennes also performed a number of repairs to units in Phase I including re-waterproofing the concrete decks and balconies in response to owner complaints. (R. p. 00714, line 24-p. 00722, line 20; R. p. 01367, lines 8-25). That work was in response to the complaints of early owners about problems and also because of Phase I units’ deteriorated condition.

In addition to seeing the completion and sale of Phase I units, IMK created the HOA in 2005 and named Rick Thoennes, William Cox, and Tim Roberson as board members. (R. p. 00432, line 23-p. 00438, line 1; R. p. 00519, line 1-p. 00521, line 1; R. p. 01326, line 2-10; R. pp. 02471; R. pp. 02472-02525; R. pp. 02526-02562; R. pp. 02568-02569). IMK remained in control of the board of the HOA until September 2008. (R. p. 01266, lines 3-5, R. p. 02471). At that time, control of the board was turned over to the owners who, collectively through the HOA, are the Plaintiffs in this action. (R. p. 02471).

Thoennes, a licensed general contractor and managing member of Marick, sat on the board of the association until September of 2008. Mr. Thoennes specifically testified that during the operative time, he was wearing a number of hats, including that of contractor, head of the sales department for IMK, and, to some degree, a member of the board. (R. p. 01385, line 21-p. 01386, line 17).

Plaintiff's expert Derek Hodgkin provided expert testimony about the various construction defects at the Project. (R. p. 00859-01139; R. pp. 02901-03222). Hodgkin developed a scope of repair for the defects and damages he discovered in Phase I (R. pp. 02901-03192), and Plaintiff presented evidence of the cost to repair totaling \$6,309,197.00.

While they disputed the extent of the problems and the cost to repair, even the defendants admitted that the project suffered from severe and pervasive defects and required an extensive repair. Bostic Brothers' expert, Rick Moore, admitted that the Project had pervasive water infiltration, rot and deterioration resulting from the contractor's failure to properly construct the Project. (R. p. 01603, line 15-p. 01604, line 14; R. p. 01605, lines 3-7; R. p. 01659, lines 18-24; R. p. 01676, line 23-p. 01678, line 24). Bostic's expert Steve Watkins estimated a cost of \$3,995,106.34 to implement Hodgkin's scope of work (not including the cost for contract administration which Watkins agreed was necessary), and a cost of \$2.47 million to implement the defendant's reduced scope of work. (R. p. 01237, lines 4-12; R. pp. 03225-03226; R. p. 01707, line 21-23; R. p. 01728, line 9-p. 01729, line 18; R. pp. 02437-02443). Marick did not offer expert testimony on any subject in the Phase I trial.

Before and during trial, all Phase I subcontractors settled with the HOA so when the Phase I verdict was rendered, the only remaining Defendants were the contractors for Phase I (Bostic and Marick) and the developers of Phase I (IMK, IK, Cox, Lollis and Thoennes). On November 8, 2013, the jury returned a verdict in favor of the plaintiff in the amount of \$5,000,000 on three causes of action: negligence, breach of warranty of service, and breach of fiduciary duty. (R. pp. 00029-00031). The jury allocated that verdict among the three causes of action and specifically awarded \$3,000,000.00 for the negligence cause of action, \$1,000,000.00 for the breach of warranty cause of service, and \$1,000,000.00 for the breach of fiduciary duty cause of action. At the request of defendants, the Court allowed apportionment of the awards under the negligence and breach of warranty causes of action pursuant to the Apportionment Statute. After deliberating, the jury allocated sixty percent (60%) of the negligence award to Bostic and forty percent (40%) to Marick and allocated seventy percent (70%) of the breach of warranty award to Marick and thirty percent (30%) to Bostic. (R. p. 00028). No allocation of any kind was requested with respect to the breach of fiduciary duty award, nor would that have been appropriate.

After the jury rendered its verdict, but before the apportionment phase of the trial, and while the jury was still empanelled, counsel for the HOA asked the Court if the jury's award was cumulative. In response, with no objection or inquiry from counsel for any defendant, the Court ruled as follows:

Well, the way the Defendants have been treating it, yes, it is cumulative because they've been treating them all as separate little things that they want – what is it ? – apportionment on this one and apportionment on that one.

(R. p. 01979, line 8-p. 01980, line 18; R. p. 00120, line 5-p. 00123, line 8). Again, no Defendant objected to that ruling or requested any inquiry of the jury on any issue. Instead, after the court's ruling that the verdict was cumulative, the defendants merely argued their positions with respect to apportionment. (*Id.*) Once the jury decided that issue, the jurors were released with the consent of the defendants. (R. p. 01979-01998).

On November 8, 2013, the Court entered a Form 4 order of judgment. (R. pp. 00024-00031). Plaintiff filed a Motion to Alter or Amend Judgment seeking to have the full amount of the cumulative judgment award, \$5,000,000, assigned to each of the causes of action. By letter dated November 25, 2013, Plaintiff clarified the prior settlement amount received from settling defendants for Phase I, \$2,855,911.77, and asked that the full set-off be applied to each cause of action, reducing the amount awarded for each cause of action to \$2,144,088.23. (R. p. letter not part of record). No defendants objected to the amount of settlements received by Plaintiff for Phase I as set forth in the letter.

As requested in Plaintiff's Motion to Alter or Amend and letter dated November 25, 2013, the trial court entered a Form 4 Judgment filed January 30, 2015, amending its prior Form 4 Judgment filed November 8, 2013, and applying a set-off for the amounts Plaintiff recovered from settling defendants. (R. p. 0036-0038).

STANDARD OF REVIEW

JNOV

"A motion for a judgment notwithstanding the verdict (JNOV) is merely a renewal of the directed verdict motion." *Jamison v. Hilton*, 413 S.C. 133, 139, 775 S.E.2d 58, 61 (Ct. App. 2015). The trial court must deny a motion for a directed verdict

or JNOV if there is conflicting evidence or the evidence yields more than one reasonable inference or its inference is in doubt. *Id.* Neither the trial court nor the appellate court has the authority to weigh or resolve conflicts in the evidence. *Id.* This Court will reverse the trial court's ruling on a JNOV motion only “when there is no evidence to support the ruling or where the ruling is controlled by an error of law.” *Law v. S. Carolina Dep't of Corr.*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006).

MOTION FOR NEW TRIAL

Exclusion of Evidence

Since the trial court has sound discretion in deciding whether to admit or exclude evidence, the trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision. *Sullivan v. Davis*, 317 S.C. 462, 465, 454 S.E.2d 907, 909 (Ct. App. 1995); *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 242, 616 S.E.2d 431, 435 (Ct. App. 2005).

A finding of abuse of discretion does not end the analysis, however, “because to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice.” *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008) (citations omitted). “Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof.” *Allegro, Inc. v. Scully*, 409 S.C. 392, 407, 762 S.E.2d 54, 62 (Ct. App. 2014), reh'g denied (Aug. 26, 2014), cert. granted (Apr. 22, 2015).

Jury Charge

To establish that the judge's refusal to give a requested charge deprived one of a fair trial, the refusal must have been both erroneous and prejudicial. *Fairchild v. S. Carolina Dep't of Transp.*, 385 S.C. 344, 351, 683 S.E.2d 818, 822 (Ct. App. 2009), *aff'd*, 398 S.C. 90, 727 S.E.2d 407 (2012). Jury instruction should be confined to the issues supported by the evidence. *Id.* When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues. *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). The trial court is not required to instruct the jury on a principle of law that is irrelevant to the case as proved. *Id.* Moreover, even if the trial court erred in failing to give a requested instruction, the requesting party also must show that the error was prejudicial to warrant reversal on appeal. *Id.* If the charge is reasonably free from error, isolated portions that may be misleading do not constitute reversible error. *Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000). To preserve an argument relating to a trial court's failure to make a requested charge, it is incumbent on the party seeking the charge to proffer it and make it part of the record, so that the appellate court can see the charge which was rejected. *See Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990) (stating the appellate court will not review the failure to give a requested jury charge where the request to charge does not appear on the record).

ARGUMENT

Marick argues throughout its brief that it was not the primary or first general contractor for the construction of Phase I and that its liability should be limited in some way as a result. It cites *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415

(1984) in support of that position, contending that it should not bear liability for Bostic's poor workmanship, which it essentially inherited. Marick's arguments here reflect a misunderstanding of the claim asserted against it.

Marick was not sued because Plaintiff wanted to impose Bostic's liability vicariously on Marick. The Plaintiff has also not contended that Marick is a warrantor of Bostic's work. Instead, and quite clearly, Marick was sued for its own negligence and breaches of warranty with respect to the significant work it did in Phase I of Stoneledge.

The facts of this case establish that Marick stepped into the project as a general contractor and undertook to complete the vast majority of the units before selling them, through Marick's own development company, IMK. Indeed, Mr. Thoennes, Marick's principal and license holder described himself as the chief sales force for IMK. In doing so, Marick did what it described in building permits as more than \$1,400,000 worth of construction to complete the units and performed extensive repairs to Bostic's shoddy work. (R. pp. 02738-02759). The evidence also supports a finding that Marick knew of other problems at the project, caused by Bostic, and failed to investigate or correct those problems. (R. p. 00680, line 7-p. 00682, line 25; R. p. 00714, line 24-p. 00722, line 20).

As in most cases of this type, the Supreme Court's opinion in *Kennedy v Columbia Lumber*, 299 S.C 335, 384 S.E.2d 730 (S.C. 1989), is determinative of the issues raised by Marick. In that case, the Supreme Court discusses *Roundtree* and explains its significance. Specifically, the *Kennedy* court notes that in *Roundtree*, a lender that monitored construction to protect its loan interest was deemed not to be liable for the faults of the contractor. "The monitoring by the lender was not enough to impose a legal duty on it to prevent construction defects." *Id* at 733. For purposes of this case,

and contrary to Marick's argument, the *Kennedy* court went on to note that in *Roundtree*: "We agreed, however that a duty on the lender to use due care did arise regarding the repair work it undertook." *Id.* The Supreme Court in *Kennedy* goes on to describe that a builder not only warrants his work (the implied warranty of service) but that he is liable in negligence when he violates a legal duty, such as the building code, or deviates from industry standards.

Just as the lender in *Roundtree* could be sued for negligently performing repairs to the roofs at that project, Marick can be sued here for its role as one of the Phase I general contractors who performed original work and performed repair work. As the court noted in *Roundtree*, the liability of the lender for faulty repairs undertaken on its behalf was a jury question. Marick's liability as a contractor for the completion of Phase I and its liability for faulty repairs was also a question for the jury. Marick's negligence and breach of warranty for the work it performed combined with that of Bostic to cause one harm, for which the Plaintiff sought recovery. *See Atlantic Coast Line v Whetstone*, 243 S.C. 61, 132 S.E. 2d 172 (S.C. 1963) (stating an injured person can sue any one or all of several joint tort-feasors whose negligent acts or omissions unite to produce his injury and that negligence, to render a person liable need not be the sole cause of an injury; but it is sufficient if it is a proximate concurring cause).

Moreover, as noted throughout this brief, Marick had the advantage that the lender in *Roundtree* did not have in the form of the Apportionment Statute. Marick tried to get the jury to reduce the awards against it based upon what it contends was its smaller role in causing the Plaintiff harm. Thus, the arguments that Marick now makes were expressly considered and weighed by the jury, and Marick has suffered no harm by

submission of this case to the jury despite the fact that it was the second, not the first, contractor to cause harm to the Plaintiff.

I. THE TRIAL EVIDENCE SUPPORTS THE COURT'S DENIAL OF MARICK'S MOTION FOR DIRECTED VERDICT ON PLAINTIFF'S CLAIM FOR BREACH OF THE IMPLIED WARRANTY OF WORKMANLIKE SERVICE.

The jury found in favor of the Plaintiff against Marick on two causes of action; negligence and breach of implied warranty of service. Marick does not take exception to the submission of those causes of action to the jury but rather argues that the jury's award against Marick is not supported by the evidence. To the contrary, the evidence is clear and overwhelming that Marick performed extensive work, as the general contractor for Phase I, and submission of that claim to the jury was entirely appropriate.

Bostic left the Stoneledge Phase I project in 2004. The evidence at trial indicated that when IMK and Marick arrived at the project, Phase I was largely in disrepair, having been vacant for the period of a year, with evidence of construction-related damage. (R. pp. 00513-00515, R. pp. 00715-00716). Marick then undertook the duty to repair the damaged condition of the Phase I units and to complete the remaining units. As noted previously, the work described in the building permits Marick pulled ranged from punch work in some units to work from the foundation up in other units. (R. pp. 02738-02759). The value of the work to be performed pursuant to the permits, as Marick estimated, was more than \$1.4 Million. (R. pp. 02738-02759). Thus, Marick indisputably performed a substantial amount of work to the unfinished units in Phase I.

Described by Marick in its initial brief in this case, Marick also undertook to make repairs to Phase I units when early owners of those units (Taylor, White and others)

complained of water infiltration and other issues. Marick's Brief pp. 37-38. This included waterproofing repairs to the porches and decks (which were later discovered to be completely rotted) and to the foundation walls (which continued to leak). (R. pp. 00697-00698; R. pp. 00744-01139). Derek Hodgin, Plaintiff's expert, testified that those repairs failed to correct the deficiencies. (R. pp. 00744-01139).

Though there was conflicting testimony between the witnesses, the Plaintiff submitted evidence that Marick was aware of construction deficiencies at the time it assumed responsibility for the project. (R. pp. 00683-00723). This is supported by the reports of leaks the owners made to Marick, and Marick's failed response to those problems, and is also supported by the conditions Hodgin observed in two units that were still incomplete when he performed his investigation in 2009. At trial, photographs of those units, taken in 2009, were presented to Mr. Hornaday who testified that he observed conditions similar to those in the photographs when he was on site. (R. pp. 00704-00709; R. pp. 02091-03192; R. pp. 02804-02884). Those photographs show extensive staining from water infiltration around windows and doors on the backside of the exterior sheathing. The photographs and Hornaday's testimony support a conclusion by the jury that Marick was on notice of defects and failed to correct them. Mr. Hodgin testified that a contractor, on notice of those problems, would have a duty to investigate further to correct deficiencies of which he is aware. (R. p. 00967, lines 8-20).

Those photographs also showed evidence that the interior fire-rated walls were not properly constructed. Though Nathan Hornaday testified that Marick had been directed by the building official to correct those walls, Mr. Hodgin testified that the photograph in question was taken in 2009, long after Marick had completed its work on

Phase I and the units had all been sold. These facts support the conclusion that Marick failed to correct a significant life safety problem in at least one unit and suggests that it may not have done so in other units.

In sum, there was abundant evidence at trial that Marick undertook to do substantial work to not only complete but repair the units in Phase I and the evidence was equally compelling that Marick's efforts failed. Thus, this case is easily distinguished from *Roundtree*, which is simply not applicable to the facts here. Submission of the warranty of service claim to the jury was appropriate, and it would have been reversible error for the trial court not to have submitted the claim to the jury.

II. THE TRIAL COURT PROPERLY DENIED MARICK'S REQUEST FOR A JURY CHARGE THAT WAS UNSUPPORTED BY THE EVIDENCE.

Marick argues that the trial court erred by failing to give the jury a charge on "liability for subsequent builder making repairs" and that it is entitled to a new trial as a result (R. p. 01802, line 15-p. 01805, line 9). This argument fails for several reasons. First, Marick failed to preserve the argument by making a proffer of the requested charge. Second, there is no evidence that the court's failure to include the charge prejudiced or otherwise harmed Marick, which was found liable by the jury on each and every cause of action asserted.

To preserve an argument relating to a trial court's failure to make a requested charge, it is incumbent on the party seeking the charge to proffer it and make it part of the record, so that the appellate court can see the charge that rejected. *See Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990) (the appellate court will not review the failure to give a requested jury charge where the request to charge does not

appear on the record). Marick failed to do this, now only telling the court what it intended to charge. Because Marick failed to make the proposed charge part of the record, it has waived this argument.

Further, to warrant reversal, the party seeking the requested jury charge must demonstrate error and prejudice. *Fairchild v. S. Carolina Dep't of Transp.*, 385 S.C. 344, 351, 683 S.E.2d 818, 822 (Ct. App. 2009), *aff'd*, 398 S.C. 90, 727 S.E.2d 407 (2012). Jury instruction should be confined to the issues supported by the evidence. *Id.*

As noted above, the evidence at trial amply supported Plaintiff's claim against Marick for its work as a general contractor for Phase I. Further, Marick asked for and received the right to ask the jury to apportion that liability between it and Bostic, giving Marick the opportunity to explain its role to the jury and any failure to charge was harmless error.

III. A CHARGE ON THE WARRANTY OF HABITABILITY WAS HARMLESS ERROR BECAUSE THE HABITABILITY CAUSE OF ACTION WAS NOT ON THE VERDICT FORM AND THE JURY DID NOT FIND MARICK LIABLE FOR A BREACH OF THE WARRANTY OF HABITABILITY.

Marick argues the trial judge improperly charged the warranty of habitability. Again, Marick must show error and prejudice, which it cannot show because the verdict form did not include a cause of action for breach of the warranty of habitability, and the jury never awarded a verdict against Marick for breach of the warranty of habitability. (R. pp. 00024-00026). The jury found for the Plaintiff against Marick on two causes of action: negligence and breach of the implied warranty of workmanlike service. There was no verdict for breach of the implied warranty of habitability.

As Marick's counsel and Judge Macaulay noted, reference to habitability was made once and "buried" in the general charge on implied warranties. (R. p. 01960, line 7-20; R. p. 01971, line 6-p. 01972, line 1). After the jury began deliberating, the trial court received a request from the foreman to provide the charge on breach of warranty of workmanlike service and breach of fiduciary duty. (R. p. 01962, line 6-10). The trial judge informed counsel that he would bring the jury in and reread the requested charges, and Marick's counsel did not object. (R. p. 01962-01963).

In addition, Marick ostensibly argues that inclusion of the instruction was prejudicial due to closing arguments made by Bostic's counsel, however, Marick never objected to counsel's closing and has not preserved the issue. (R. p. 01988, line 2-p. 01990, line 13).

IV. THE TRIAL COURT PROPERLY SUSTAINED COUNSEL'S OBJECTION TO MARICK'S CLOSING.

Marick argues that the trial court improperly prevented it from making certain arguments to the jury. (R. pp. 01883-01885). As an initial matter, Marick failed to proffer its jury argument to the court, and thus has the argument is not preserved for review. *See Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990) (the appellate court will not review the failure to give a requested jury charge where the request to charge does not appear on the record). Moreover, the ruling was proper, and Marick is unable to prove that if sustaining the objection was an error, it was harmful error.

V. THE PLAINTIFF PRESENTED EVIDENCE THAT MARICK WAS A PROXIMATE CAUSE OF THE PLAINTIFF'S DAMAGES.

Marick next argues that Plaintiff failed to offer evidence that its numerous failures with respect to Phase I, including its failure to comply with the code in performance of over \$1.4 million worth of completion work; its extensive, failed efforts to repair waterproofing on the porches and decks and foundation; and its disregard of open and obvious deficiencies that Hornaday admits he saw and did not repair were the proximate cause of Plaintiff's damages. Marick's proximate cause arguments fail as a matter of fact and law.

"Proximate cause does not mean the sole cause; the defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury." *Juaire v. United States*, No. 4:09-CV-709-TLW, 2012 WL 527598, at *11 (D.S.C. Feb. 16, 2012); *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997). A determination of proximate cause is a question of fact for the jury.

As noted previously, there was ample evidence of Marick's failure to do proper work in Phase I and its failure to address known conditions in Phase I prior to completing and selling the units. Those defects, combined with the neglect of Bostic, caused Plaintiff to suffer what the jury believed to be \$5,000,000 worth of harm. While Marick's view of the evidence was that the damages associated with its neglect was limited to \$250,000, this does not take into account, among other things, foundation repair problems, contract administration services, or the cost associated with emergency repairs. It also fails to recognize that the jury is free to assess damages proximately caused by the

conduct of the defendant, which it did in this case. In sum, the jury simply did not agree with Marick's assessment of the damages resulting from its negligence of breaches.

Finally, as with Marick's other arguments, to mitigate Marick's exposure in negligence and warranty, at Marick's request, the Court submitted to the jury the question of apportionment of damages, pursuant to S.C. Code Ann. §15-38-15. The statute's very purpose is to prevent a defendant who may have a small percentage of responsibility for the overall damages from being held jointly and severally liable for the entire claim. After hearing Marick's arguments both at closing and at the apportionment phase of the trial, the jury found Marick 40% responsible on the negligence cause of action. Thus, when Marick was given the opportunity to argue to the jury specifically that it was only a small part of the responsibility for the damages, the jury seemed to agree and reduced Marick's exposure.

With regard to the breach of implied warranty of service, the result is the same. In addition, Marick offered no evidence on its own behalf of the damages associated with what it contends is its discreet warranty exposure. As noted above, the damages are indivisible and, subject to application of the Apportionment Statute, Marick and Bostic are jointly responsible for those damages.

VI. THE PLAINTIFF SOUGHT ONE REMEDY AND WAS NOT REQUIRED TO ELECT.

Marick next argues that Plaintiff was required to elect between remedies. This argument reflects a misunderstanding of election of remedies, which is not applicable to this case. "Election of remedies involves a choice between different forms of redress afforded by law for the same injury.... It is the act of choosing between inconsistent remedies allowed by law on the same set of facts." *Taylor v. Medenica*, 324 S.C. 200,

218, 479 S.E.2d 35, 44–45 (1996); *Keeter v. Alpine Towers Int'l, Inc.*, 399 S.C. 179, 197, 730 S.E.2d 890, 899-900 (Ct. App. 2012). When a plaintiff seeks only one remedy, there is nothing to elect. *Creach v. Sara Lee Corp.*, 331 S.C. 461, 464, 502 S.E.2d 923, 924 (Ct. App. 1998); *Keeter v. Alpine Towers Int'l, Inc.*, 399 S.C. at 197.

Here, everyone including Marick, Plaintiff, and the trial court agree that the damages Plaintiff requested at trial, essentially the cost to repair, was the remedy the Plaintiff sought. Plaintiff sought no other remedy, inconsistent or otherwise. Thus, there was nothing for Plaintiff to elect. Marick is arguing that the Plaintiff was required to elect between causes of action, all of which sought the same remedy. But there is no requirement for Plaintiff to elect between causes of action when the Plaintiff seeks only one remedy.

VII. THE TRIAL JUDGE DETERMINED THAT THE VERDICT WAS CUMULATIVE AND PROPERLY APPLIED THE SET-OFF.

In this argument, Marick contends that the trial court improperly allocated the set-off and erred in holding that the jury's award at trial was cumulative, which resulted in the court's subsequent amendment of the verdict to reflect the entire judgment, \$5,000,000, as to each cause of action. Both of Marick's contentions are incorrect.

Like *Bostic* in Appellate Case Number 2015-000417, Marick argues that the trial court should not have allocated the set-off among all causes of action and instead should have only allocated it among certain causes of action. Marick fails to acknowledge that after amendment of the judgment, the trial court ultimately applied the entire set-off to each cause of action. In the January 30, 2015 order, the court applied the full set-off to the negligence award, the award for breach of warranty of service, and the breach of

fiduciary award (with the full set-off being applied to each of the five defendants against whom that award was obtained). (R. p. 00035-00038). There is no scenario under which Marick could have received a greater share of the set off than the 100% it received.

Marick also takes exception to the trial courts finding that the jury's award was cumulative, citing with approval *Keeter* for the proposition that the trial judge was required to inquire of the jury about its intent. This position represents a disregard of what happened at trial and a misunderstanding of *Keeter*.

As noted previously, after the jury rendered its verdict, but before allocation and while the jury was still empanelled, counsel for the HOA asked the Court if the award was cumulative. In response, with no objection or request for inquiry from counsel for any defendant, the Court ruled as follows:

Well, the way the Defendants have been treating it, yes, it is cumulative because they've been treating them all as separate little things that they want – what is it ? – apportionment on this one and apportionment on that one.

(R. p. 01979, line 8-p. 01980, line 18; R. p. 00231, line 5-p. 00234, line 8). Again, no Defendant objected to that ruling or requested that an inquiry be made of the jury, as counsel did in *Keeter*. Because Marick failed to object to the court's conclusion and failed to request an inquiry of the jury, it has waived this issue. *See Vigilant Ins. Co. of New York v. McKenney's Inc.*, 524 F. App'x 909, 914 (4th Cir. 2013) (denying Vigilant's motion for new trial because counsel did not bring the asserted inconsistency to the district court's attention before the jury was excused).

Second, contrary to Marick's contention here, *Keeter* does not require a colloquy between the judge and the jury. In *Keeter* the Court of Appeals held, "To determine the jury's intent in an ambiguous verdict, the court should consider the entire proceedings,

focusing on the events and circumstances that reasonably indicate what the jury intended.” *Keeter v. Alpine Towers Int’l, Inc.*, 399 S.C. 179, 199, 730 S.E.2d 890, 900 (Ct. App. 2012). That is precisely what the trial judge did here, without the need to colloquy with the jury.

VIII. THE TRIAL COURT PROPERLY DENIED MARICK’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE PLAINTIFF’S BREACH OF FIDUCIARY DUTY CLAIM

Marick fails to distinguish a typical common law claim for breach of fiduciary with the unique fiduciary duty articulated by the Supreme Court in *Concerned Dunes West Residents v. Georgia-Pacific Corporation*, 349 S.C. 251, 562 S.E.2d 633 (S.C. 2002). This claim, which Plaintiff pled and the court charged, is clearly spelled out in that case and is dispositive as to the issues Marick has raised on appeal.

Marick contends that in order to prevail on that claim, the HOA was required to provide evidence that Thoennes, who served on the board and was found personally liable for breach of fiduciary duty, had actual knowledge of defects at the time control of the association was turned over to the owners.

In fact, there was evidence in the record that Mr. Thoennes, a member of and the principal of Marick, was clearly aware of defects that a jury could infer put him on notice that pervasive defects existed throughout Phase 1 of Stoneledge, prior to the time control was turned over to the owners in 2008.

Further, nothing in the South Carolina cases discussing a developer’s fiduciary duty to turn over the common elements in good condition requires that the HOA establish knowledge or notice by the developers who were in control of the association prior to turnover. While some cases include factual scenarios involving developers with actual

knowledge, a requirement of notice to the developer of defects is not among the elements of the claim. Rather, as stated in *Concerned Dunes West Residents v. Georgia-Pacific Corporation*, 349 S.C. 251, 562, S.E.2d 633 at 638 (S.C. 2002):

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

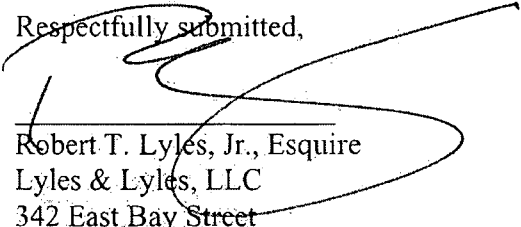
Furthermore, contrary to Marick's position, not all of the cases discussing the potential breach of fiduciary duty involve claims where developers had actual or constructive knowledge of problems at the time of turnover. See *Magnolia North Property Owners' Association v. Heritage Communities*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).

The trial court was not required to charge the business judgment rule. Again, as an initial matter, the proposed charge is not a part of the record, and Marick has waived the argument. Second, the cases Marick cites do not involve the particular fiduciary duty owed by a developer at the time of turnover, and Marick does not cite any authority for its proposition that the business judgment rule should be charged in this type of case. Moreover, any error cannot prejudice the defendant who presented no evidence establishing that its actions comported with requirements of the business judgement rule.

CONCLUSION

For these reasons, the Respondent requests the Court affirm the jury verdict and the orders from which Marick appeals.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals:

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Appellate Case No. 2015-000392

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC.,

RESPONDENT,

v.

IMK DEVELOPMENT CO., LLC, LLC, INTEGRYS KEOWEE DEVELOPMENT,
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INC., BRADFORD D. SECKINGER, WILLIAM COX, LARRY D. LOLLIS, RICK
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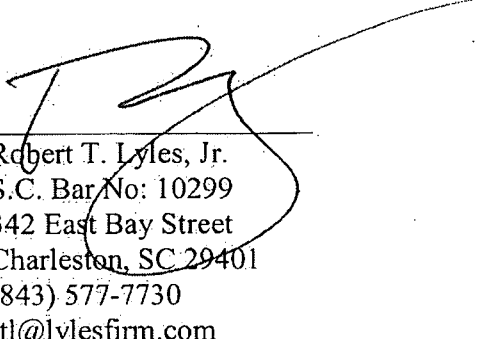
OF WHOM MARICK HOME BUILDERS, LLC, AND RICK THOENNES ARE THE

APPELLANTS,

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on counsel for the Appellants by depositing a copy in the United States Mail, First Class postage prepaid, this 29th day of August, 2016, to the following address:

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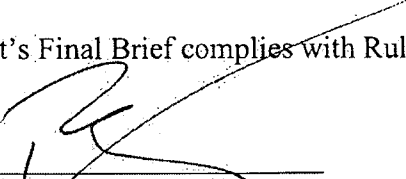
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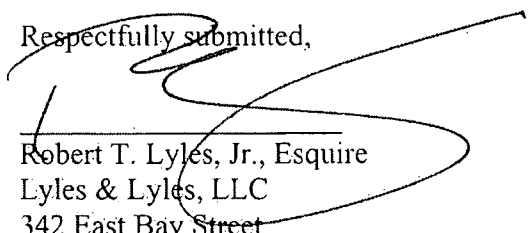
The undersigned hereby certifies that the Respondent's Final Brief complies with Rule 211(b), SCACR.


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For these reasons, the Respondent requests the Court affirm the jury verdict and the orders from which Marick appeals.

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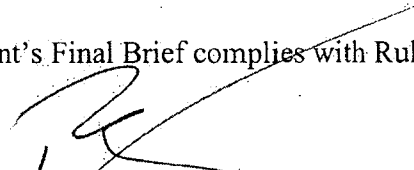
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