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

Waverly at Hamlin Plantation Townhome Association, Inc., ***Respondent***,

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 Sanches 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 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., ***Defendants***,

And

Jeffery 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 Partricia 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 Gilespie, 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 Sachez 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 Gilespie, Jared D. Overcash, are the ***Respondents***,

And 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., ***Defendants.***

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On June 6, 2013, Waverly at Hamlin Plantation Townhome Association, Inc. ("Waverly HOA") filed a complaint alleging causes of action for unfair trade practices, breaches of various implied warranties, negligence, breach of contract, and breach of fiduciary duty against John Wieland Homes and Neighborhoods of South Carolina, Inc. ("JWH"). *Record on Appeal* (*"R."*) at pp. 134-146. On April 17, 2014, JWH responded to the complaint by generally denying the material allegations and by asserting causes of action sounding in indemnity, negligence, breach of warranties, and breach of contract against various third-parties that had performed work on or supplied materials for the subject project. *R.* pp. 147-174. The various subcontractors and materials suppliers, in turn, served and filed responsive pleadings.

On July 11, 2014, Jeffery Sills, individually and as class representative, ("Class") filed a separate complaint alleging causes of action against JWH and other defendants for negligence, negligent misrepresentation, breach of various implied warranties, individual liability, unfair trade practices, breach of various fiduciary duties, breach of contract, strict liability, piercing the corporate veil, and violations of the Residential Property Condition Disclosure Act. *R.* pp. 175-227. On October 6, 2014, JWH responded to the complaint by generally denying the material allegations and by asserting causes of action sounding in indemnity, negligence, breach of warranties, and breach of contract against various third-parties that had performed work on or supplied materials for the subject project. *R.* pp. 228-304. The various subcontractors and materials suppliers, in turn, served and filed responsive pleadings.

On December 19, 2014, the Waverly HOA added additional parties by filing an amended summons and complaint. *R.* pp. 305-322. On January 26, 2015, JWH responded to the amended complaint by generally denying the material allegations and by asserting various cross-claims against various subcontractors and materials suppliers. *R.* pp. 323-343. The remaining defendants timely served responsive pleadings to the amended complaint and cross-claims. In addition, several supplier defendants filed third-party claims against subcontractors.

On March 4, 2015, the Class also added additional parties by filing an amended summons and complaint. *R.* pp. 344-397. On March 6, 2015, JWH responded to the amended complaint by generally denying the material allegations and by asserting various cross-claims against various subcontractors and materials suppliers. *R.* pp. 398-422. The remaining defendants timely served responsive pleadings to the amended complaint and cross-claims. In addition, several supplier defendants filed third-party claims against subcontractors.

On May 3, 2016, the Honorable Roger M. Young executed and filed a Consent Order of Bifurcation that bifurcated all claims against Defendant Wheelock Street Capital, LLC in both cases, *R.* pp. 3-12, and executed an Order Granting Class Certification, which was filed on May 4, 2016, *R.* pp. 13-32.

After the resolution of various motions, the trial of the two cases occurred from January 23, 2017, to January 30, 2017, before a jury at the Charleston County Courthouse. *R.* pp. 423-1603. Prior to submission to the jury, the Waverly HOA and Class withdrew or the trial court dismissed all of the causes of action against JWH except those sounding in negligence. *See R.* pp. 1519-1525. After hearing the evidence presented by both parties and

deliberation, the jury returned a verdict of $7,000,000 to the HOA and $200,000 to the Class for a total verdict of $7,200,000. *R.* pp. 39-49. It is from those verdicts and several of the trial court's rulings both during and after trial that JWH appeals.

STATEMENT OF FACTS

These cases arise from allegations of defects in the construction of certain residential townhomes within the Waverly at Hamlin Plantation Neighborhood ("Waverly"), which is located in Mount Pleasant, South Carolina. *See R.* pp. 134-146; 175-227. Waverly is a complex of 105 townhome units within twenty-two (22) multi-family buildings made up of five (5) different types of buildings, which include either 2, 3, 4, 5 or 6 attached townhomes, constructed between 2005 and 2009 and governed by the 2003 international residential building code. *R.* pp. 749-751. The Waverly townhome buildings are two story wood-frame townhomes clad with horizontal Hardiplank fiber cement siding built on concrete masonry unit foundations with continuous reinforced concrete footings. The townhomes feature vinyl clad windows, covered entryways, one or two story front porches, and screened-in and open decks on the rear of the homes. The roofs are covered with architectural asphalt composition shingles. The complex is part of a larger development that includes other townhome projects and neighborhoods of single family homes.

John Wieland Homes and Neighborhoods of South Carolina, Inc. ("JWH") developed the project and served as construction manager/general contractor during its construction. *R.* pp. 147-174; 228-304. JWH, in turn, retained numerous subcontractors to perform work during construction of the project. *Id.* JWH retained control of the homeowners' association until approximately 2009-2010.

On June 6, 2013, Waverly at Hamlin Plantation Townhome Association, Inc. ("Waverly HOA") filed a complaint alleging various causes of action against JWH and other "related

entities."[1] *R.* pp. 134-146. The Waverly HOA generally claimed that numerous construction deficiencies had caused property damage that will affect the long-term performance of the buildings, including the improper installation of windows, siding, handrails, roof shingles, flashing, firewalls, insulation, structural framing, and ductwork.[2] Id. JWH timely responded to the complaint by denying all of the material allegations and adding as third party defendants all of the subcontractors and material suppliers whose work or materials gave rise to the allegations.[3] *R.* pp. 147-174.

On July 11, 2014, Jeffery Sills, individually and as a class representative, ("Class") filed a separate complaint alleging various causes of action against JWH and other defendants. *R.* pp. 175-227. A class was eventually certified by the circuit court and the two cases proceeded as a single consolidated action for the purposes of discovery. *R.* pp. 13-32. Sills was eventually replaced as the class representative after the sale of his townhome for a profit. *R.* pp. 1631-1641. The replacement class representative, Edward Peyser, was also later replaced for the same reason by the class representative at trial, Stephen Denby. *R.* pp. 33-38.

Prior to trial, the Waverly HOA and Class reached settlements with all of the subcontractor/material suppliers except for a few that either failed to appear, did not have

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1 Although counsel for Respondents Waverly HOA and the Class has stated on numerous occasions that "multiple Wieland Defendants" were involved in the development, construction, and sale of the townhomes, those assertions are not factually supported. *See R.* pp. 612-1603.

2 Respondents Waverly HOA and the Class eventually added allegations of additional construction deficiencies. *See R.* pp. 305-322; 344-397.

3 Respondents Waverly HOA and the Class later amended the complaint to bring direct claims against the third-party defendants. *See R.* pp. 305-322; 344-397.

insurance coverage, or simply convinced the Waverly HOA, Class, and JWH that they had no potential fault for the alleged damages. Although JWH agreed to release its third-party claims against most of the subcontractor and materials suppliers, it maintained third-party claims against several parties and prepared to proceed against those subcontractor and materials suppliers at trial. *See R.* pp. 423-809. After considering several motions to bifurcate third-party claims, the trial court bifurcated JWH's third-party claims against several subcontractor and materials suppliers and *sua sponte* declared that the others would also be tried at a later date. *Id.*

JWH also negotiated a good faith tripartite settlement of its third-party claims against an additional subcontractor, Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC ("Mora"), with the Waverly HOA and Class and Mora. *R.* pp. 1642-1653; 39-53; 1706-1801; 64-69. The settlement agreement included an "enhanced set-off" amount to be attributed on behalf of Mora to the total set-off created by the other settling defendants.[4] Id. After the trial, the Waverly HOA and Class reneged on the agreement and the trial court refused to enforce the terms of the agreement. *Id.*

After the resolution of various motions, the trial of the two cases occurred from January 23, 2017, to January 30, 2017, before a jury at the Charleston County Courthouse. (*Hr'g Tr.*, Jan. 17, 2017; *Hr'g Tr.*, Jan. 19, 2017; *Trial Tr. vols. 1-6*, Jan. 23-30, 2017.) Prior to

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[4] Prior to trial, the HOA and Class Action entered into various agreements and releases with many of the subcontractors and material suppliers. *See R.* pp. 39-49. As a result, JWH is entitled to a setoff from the total verdict of $7,200,000.00. *See S.C. Code* § 15-38-50; *see also Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 271–72 (Ct. App. 1999). JWH contends that the total set-off amount includes an enhanced setoff of $433,650.00 from a negotiated, good faith agreement amongst the HOA and Class Action, Mora, and JWH. *R.* pp. 1642-1653; 39-53; 1706-1801; 64-69.

submission to the jury, the Waverly HOA and Class withdrew or the trial court dismissed all of the causes of action against JWH except those sounding in negligence. *R.* pp. 423-1604. After hearing the evidence presented by both parties and deliberation, the jury returned a verdict of $7,000,000 to the HOA and $200,000 to the Class Action for a total verdict of $7,200,000. *R.* pp. 1519-1525. It is from those verdicts and several of the trial court's rulings both during and after trial that JWH appeals.

STANDARD OF REVIEW

An appellate court has the power to affirm, reverse, or modify the judgment of the trial court. *See generally Detheridge v. Earle*, 3 S.C. 396, 399 (1872). In an appeal of a trial by jury of an action at law, the jurisdiction of the appellate court generally extends to correcting errors of law. *Townes Assocs., Ltd. v. Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). The appellate court, however, may also modify or reverse the factual finding of a trial court where no evidence reasonably supports the finding. *Id.* at 85-86, 221 S.E.2d at 775.

Although the admission or exclusion of evidence is within the sound discretion of the trial court, "the exercise of a trial court's discretion implies conscientious judgment, not arbitrary action, and takes account of the law and particular circumstances of the case, being directed by the reason and conscience of the judge to a just result." *Horn v. Davis Elec. Constructors*, 312 S.C. 363, 366, 440 S.E.2d 398, 400 (Ct. App. 1994) (citing *Nienow v. Nienow*, 268 S.C. 161, 232 S.E.2d 504 (1977); *State v. Hill*, 266 S.C. 49, 221 S.E.2d 398 (1976)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citing *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987)).

An appellate court may reverse or modify a trial court's ruling on a motion for directed verdict or judgment notwithstanding the verdict where there is not evidence in the record to support the ruling. *Creech v. Wildlife & Marine Resources Dep't*, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997) (quoting *Strange v. South Carolina Dep't of Hwys. & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994)). An appellate court may also reverse or modify a trial court's ruling on a motion for a new trial. *Vinson v. Hartley*, 324 S.C. 389, 404-05, 477

S.E.2d 715, 723 (Ct. App. 1996) (citing *Umhoefer v. Bollinger*, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989)).

In fact, a trial court's ruling on a motion for a new trial motion must be reversed or modified where the trial court's findings are wholly unsupported by the evidence or conclusions are controlled by an error of law. *Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 297 (citing *S.C. State Highway Dept. v. Clarkson*, 267 S.C. 121, 226 S.E. (2d) 696 (1976)). "In deciding whether to assess error to a court's denial of a motion for a new trial, the reviewing court must consider the testimony and reasonable inferences to be drawn thereform in the light most favorable to the nonmoving party." *Vinson*, 324 S.C. at 404-05, 477 S.E.2d at 723 (citing *Umhoefer*, 298 S.C. 221, 379 S.E.2d 296).

An appellate court may also set aside a verdict found to be grossly excessive. *Easler v. Hejaz Temple A. A. O. N. M. S.*, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985) (quoting *Young v. Warr*, 252 S.C. 179, 187, 165 S.E.2d 797, 800-01 (1969)). In fact, the appellate court has a duty to set aside a verdict where the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other consideration not found in the evidence. *Id.*

ARGUMENT

I. THE TRIAL COURT ERRED IN BIFURCATING APPELLANT'S CLAIMS AGAINST THE THIRD-PARTY DEFENDANTS.

Prior to trial, Respondents Waverly HOA and the Class resolved their claims against all but one of the subcontractor and materials supplier defendants.[5] Appellant, however, had not resolved its claims against third-party defendants Jeorge Medina, Jeorge Medina a/k/a JMC Construction, Inc. ("JMC"), Gerardo Rosette Sanchez a/k/a GR Painting, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting ("Sanchez") and The Muhler Company, Inc. ("Muhler"). Appellant, therefore, desired to have its claims against those entities adjudicated during the trial for the strategic purpose of arguing that the jury should allocate any liability amongst the primarily culpable parties involved in the project and for judicial economy. The trial court, however, bifurcated Appellant's claims against those parties for trial at a later time over Appellant's objections.

In South Carolina, a party should be allowed to have the case against it tried in a manner that allows for the proper allocation of liability amongst the culpable parties, subject to the limitations and directives of the legislature and the South Carolina Supreme Court. *See generally Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017). Accordingly, "[a] trial should be bifurcated ***only*** if the issues are so distinct that trial of each alone would not result in ***injustice***." *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 516, 698 S.E.2d 822, 828 (Ct. App. 2010) (***emphasis*** added); *see also Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998).

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[5] As will be discussed below, Medina and Appellant believed that Medina had reached a settlement with Respondents Waverly HOA and the Class prior to trial.

In the orders granting the bifurcation motions, the trial court stated that bifurcation would not "prejudice the parties" and would "promote convenience and be conducive to expedition and economy . . . ." *See R.* pp. 70-81.[6] The bifurcation, however, achieved none of those goals and, in fact, resulted in significant prejudice to Appellant because the bifurcation required Appellant to try non-distinct issues arising from the same facts and circumstances on separate occasions and prevented Appellant from presenting a single jury with the possibility of allocating liability amongst other potentially culpable parties.

The trial court erred as a matter of law in bifurcating these claims because the claims do not arise from distinct issues. *See Flagstar Corp. v. Royal Surplus Lines*, 332 S.C. 182, 187-188, 503 S.E.2d 497 (Ct. App. 1998) ("Indeed, it has been expressly recognized that the 'distinct issues' requirement 'is dictated for the very practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each could be inconsistent.'"). In this case, the primary dispute between the Respondents Waverly HOA and the Class and Appellant concerned whether Appellant was responsible for defective construction. Similarly, the primary issue between Appellant and the subcontractor and materials supplier defendants concerned whether those defendants held responsibility for the same defective construction. As these issues arose from the same facts and circumstances and involved the same evidence and the potential prejudice of exposing Appellant to multiple proceedings before different fact finders responsible for determining the same issues, the trial court erred in bifurcating the claims.

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[6] There is no Order specifically addressing Muhler's claims, which were bifurcated as well.

In fact, the trial courts' determination that separate proceedings would promote convenience and be conducive to expedition and economy is wholly not founded in the evidence and constitutes an abuse of discretion. A single trial would have been judicially expedient because the bifurcated claims involve the same evidence and same witnesses. Appellant and the subcontractor and materials supplier defendants even shared the primary defense experts. At most, the inclusion of the claims would have required an additional day or two of trial. Separate trials, on the other hand, require two completely separate trials at different times. As a result, the trial court's determination that the bifurcation promoted convenience, expedition, and economy is wholly not founded in the evidence.

Moreover, the bifurcation prejudiced Appellant by preventing Appellant from presenting a single jury with the possibility of allocating liability amongst other potentially culpable parties. There can be no greater prejudice to a party at trial than exposing it alone to a potentially multimillion dollar verdict when a single jury could consider the liability of other potentially culpable parties at the same time. In preventing Appellant from presenting the jury with the possibility of allocating liability amongst other potentially culpable parties, the trial court erred in bifurcating the claims and prejudiced Appellant.

II. THE TRIAL COURT ERRED IN NUMEROUS EVIDENTIARY RULINGS.

During trial, the trial court erred by denying several of Appellant's motions regarding various evidentiary issues. The denial of those motions resulted in errors in law that prejudiced Appellant.

A. The Trial Court Erred in Denying Appellant's Motion to Exclude the Testimony of Respondents Waverly HOA and the Class's Expert Myles Glick ("Glick") Addressing the Duties of a Developer to an HOA.

At trial, Respondents Waverly and the Class *for the first time ever* offered Glick, an architect by trade, as an expert regarding the duties of a developer to a homeowners' association. Despite the obvious surprise and resulting prejudice to Appellant by the failure to inform opposing counsel prior to trial that Glick intended to proffer such testimony, the trial court allowed the testimony into evidence. *See R.* pp. 728; 734-737. The admission of that testimony constituted an error of law that prejudiced Appellant.

In *Bensch v. Davidson*, 354 S.C. 173, 580 S.E.2d 128 (2003), the South Carolina Supreme Court addressed a similar situation. In *Bensch*, the plaintiffs had responded to discovery requests by indicating that they did not intend to call an expert witness at trial. At trial, however, the plaintiffs attempted to elicit expert testimony from a previously identified fact witness. In affirming the trial court's exclusion of the testimony, the South Carolina Supreme Court stated as follows:

> Respondents argued they were not informed West would be used as an expert at trial. Appellants countered that because they had indicated West would be a witness and that respondents had deposed West, allowing him to testify as an expert would not be a surprise to respondents. The trial court ruled West could not testify as an expert due to appellants' failure to list him as an expert witness. . . . . By the terms of *Rule 33, SCRCP*, "interrogatories shall be deemed to continue from the time of service, until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, shall be promptly transmitted to the other party." Therefore, there is a continuing duty on the part of the party from whom information is sought to answer a standard interrogatory, such as the one requesting the party list any expert witnesses whom the party proposes to use as a witness at the trial of the case.
>
> The parties' disclosure of information before trial is designed to avoid surprise and to promote decisions on the merits after a full and fair hearing. *Reed v. Clark, 277 S.C. 310, 286 S.E.2d 384 (1982).* When it appears a violation

> of Rule 33 has occurred, it lies within the discretion of the trial court to decide what sanction, if any, should be imposed. *Jackson v. H&S Oil Co., Inc., 263 S.C. 407, 211 S.E.2d 223 (1975)* (case decided under former Circuit Court Rule 90). The sanction of excluding a witness should never be lightly invoked. *Kirkland v. Peoples Gas Co., 269 S.C. 431, 237 S.E.2d 772 (1977).* Before so ruling, the trial court should ascertain the type of witness involved, the content of the evidence, the explanation for the failure to name the witness in answer to the interrogatory, the importance of the witness' testimony, and the degree of surprise to the other party. *Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974).*
>
> We find the trial court justifiably determined appellants should be sanctioned for failing to list West as an expert witness in their responses to the interrogatories. The trial court properly considered several factors as dictated by *Laney v. Hefley, supra.*
>
> First, the court looked at appellants' explanation for their failure to name West as an expert. Appellants informed the court West was not listed as an expert because appellants did not think West would have to be qualified as an expert to testify to defects in the construction.
>
> Second, the court considered the importance of West's testimony. The court indicated West's testimony on the quality of workmanship was irrelevant given appellants had breached the contract by terminating respondents from the job before the work was completed. The court also noted that the content of West's proposed testimony had already been presented to the jury through appellant Jim Davidson's testimony.
>
> Finally, the court considered the degree of surprise to respondents. The court found, by not listing West as an expert witness, respondents were prevented from possibly hiring their own expert.
>
> Considering the factors as outlined in *Laney*, the trial court did not abuse its discretion by excluding West's testimony regarding the quality of respondents' workmanship. *See Hoeffner v. The Citadel, 311 S.C. 361, 429 S.E.2d 190 (1993)* (trial court's ruling on admission of evidence will not be disturbed on appeal absent abuse of discretion amounting to error of law).

Id. at 181-183, 580 S.E.2d at 132-133.

The trial court in this case did not conduct a *Laney* analysis. Instead, the trial court permitted Glick to testify regarding the developer issue without qualification. As a result, when questioned as to his qualifications as a "developer," Glick revealed that he had never served in that capacity with respect to a development similar to Waverly. *R.* pp. 839-841.

Glick instead proffered that he remembered being allowed to testify as a development expert only once, that being in a Charleston County case approximately thirty (30) years ago.[7] *Id.* He further testified that he had never, in fact, been employed as a developer tasked with setting up a HOA. *R.* pp. 849-850. Nevertheless, the trial court still allowed Glick to testify as an expert on the duties owed by a developer to a homeowners' association.

As a result, Glick opined based on his 'extensive' experience as a developer[8] that Appellant had breached its duty to Respondent Waverly HOA by failing to turn over the common elements of the project in good condition. *R.* pp. 865-867. Under cross-examination, however, Glick:

- freely admitted that he had no idea what year Appellant turned the HOA over to the Waverly owners;
- testified that he had reviewed the Master deed for the project, which would have been impossible since no such document exists;
- admitted that he had seen no evidence to indicate that Appellant knew that the common elements were in poor condition when turned over to the HOA; and
- admitted that he had no knowledge of the HOA's financial condition at the time that the HOA was turned over.

R. pp. 898-901.

As Glick lacked both the experience and the factual knowledge to form a viable opinion as to whether Appellant complied with any duties owed by a developer and Respondents Waverly HOA and Class's failure to disclose that Glick intended to proffer such

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[7] After searching the available public record, Appellant has not been able to locate any such case. As such, Appellant can only assume that Glick was mistaken about the details of the case, which serves as further evidence that it should not have been considered by the trial court in its determination as to whether to permit Glick to testify as to a developer's duties regarding a homeowners' association.

[8] Encompassing all of two (2) projects.

testimony, the trial court abused its discretion and prejudiced Appellant by permitting Glick to be qualified as an expert and to proffer his opinions regarding the nature and extent of a developer's duties to a homeowners' association and whether Appellant satisfied any such duties. As a result, this Court should reverse the trial court's ruling and grant a new trial or modify the jury's verdict.

B. The Trial Court Erred in Denying Appellant's Motion to Exclude the Testimony of Respondents Waverly HOA and the Class's Expert Francis De Santis ("De Santis") Addressing the Loss of Use Claim As There Was No Evidence Presented that Any of the Homeowners Would Be Unable to Use Their Units While Repairs Were Being Made.

On the third day of trial, Respondents Waverly HOA and the Class called De Santis to testify regarding the "loss of use" valuation for the period of time in which the Waverly owners would not be able to inhabit their units because of repairs. *R.* pp. 442-493. Appellant objected to De Santis being allowed to offer such testimony because none of the four (4) witnesses presented prior to De Santis presented any evidence whatsoever that the homeowners would have to move out of their respective units because of repairs. *R.* pp. 612-1068. Nevertheless, the trial court allowed De Santis to publish damages of $1,758,000 to the jury despite the record being devoid of any evidence to support the claim that the homeowners would have to vacate their units during any required repairs. *Id.*

During direct examination, De Santis attempted on multiple occasions to testify that since the issuance of his valuation report he had discussed the length of time the units would be uninhabitable with Respondents Waverly HOA and the Class's other expert witnesses. Appellant, however, objected each time and the trial court sustained those objections. *R.* pp. 1079-1080. Nevertheless, the trial court eventually allowed De Santis to testify as follows:

BY MS. NOLAND:

Q: Have you relied on any opinions in this matter with respect to the time frame that these buildings may be uninhabitable?

A; Yes, ma'am, I received an e-mail indicating –

MR. HASELDEN: Your Honor –

THE COURT: Yes.

MR. HASELDEN: E-mail is the same thing as –

THE COURT: He can rely on hearsay. He can't say what was said. He can establish that as the foundation of his opinion. Overruled. Sir, you just cannot say what anyone said to you.

THE WITNESS: Yes, ma'am. So an e-mail – I received an e-mail that gave me the starting point and that was the five to six month estimate.

R. pp. 1081-1082. As a result of permitting this testimony, the trial court allowed De Santis to improperly bolster the Respondents Waverly HOA and the Class's claims by relying on information provided to him by an unidentified source, unavailable for cross-examination. De Santis never proffered any additional explanation for the nature of the information or how it factored into the opinions that he had maintained for over two (2) years.[9]

Although an expert may testify regarding easily ascertainable information that would otherwise constitute hearsay, an expert may not testify regarding hearsay that constitutes the opinions of others. In *Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000), over objection, a plaintiff's economist was allowed to disclose to the jury the amount of the plaintiff's anticipated future medical expenses as calculated in a life care plan that a third party had prepared for the plaintiff and which was

[9] De Santis testified that his valuation report was created in March of 2015 and that it had not been altered since that date. *R.* pp. 1080-1081.

never admitted in evidence. In ruling that the expert properly disclosed to the jury the figures contained in the life care plan, the Court stated:

> Dr. Wood rendered his opinion as to the economic damages sustained by the Hundleys, which included the present value of future medical and related costs. To render his opinion, he relied upon cost information contained in the Life Care Plan. As to the costs associated with future care, he testified that he could have obtained the figures himself, but the information contained in the plan was of the type normally relied upon by experts in his field in rendering an opinion. Based upon this foundation, the trial court allowed the testimony. We see no abuse of discretion. ***In this case, the contested cost components were not opinions of others.*** The information was easily ascertainable, and would have been no less hearsay had the economist made the inquiry from the health care providers himself. Indeed, we see no distinction between this information and the other information necessary to a present day value calculation, such as inflation rates, wage rate tables, and life expectancy tables.

Id. at 295-96, 529 S.E.2d at 51(***emphasis*** added).

In this case, the trial court erred by allowing De Santis to testify, over objection, as to loss of use where, unlike *Hundley*, the information relied upon constituted the opinions of others not available for cross-examination:

- despite there being no prior testimony or other evidence introduced at trial that established that the inhabitants would have to move out of their units;
- even though the underlying information was not easily ascertainable to De Santis from other sources;
- despite the fact that the information was not factual in nature, but rather an unsubstantiated opinion fed to De Santis via e-mail by one of Respondents Waverly HOA and the Class's other experts no longer subject to cross-examination by Appellant;
- without Respondents Waverly HOA and the Class's establishing a sufficient basis for the introduction of that information; and
- despite the fact that there was no evidence presented that experts on loss of use readily rely on such information in forming their opinions.

In allowing De Santis' testimony, the trial court abused its discretion and prejudiced Appellant. As a result, this Court should reverse the trial court's ruling and grant a new trial or modify the jury's verdict.

C. The Trial Court Erred in Denying Appellant's Motion to Exclude the Testimony of Respondents Waverly HOA and the Class's Expert John Freeman ("Freeman").

1. Freeman's Testimony Was Cumulative to the Testimony of Glick Addressing a Developer's Duties and, Therefore, Amounted to Nothing More Than Improper Bolstering.

Prior to Freeman's testimony, Appellant moved to exclude the witnesses' testimony as cumulative to the testimony given the prior day by Glick on the issue of the duties owed by a developer to an HOA. *R.* pp. 1105-1166; see generally Rule 403, *SCRE*; Ott v. Pittman, 320 S.C. 72, 78-79, 463 S.E.2d 101, 105 (Ct. App. 1995) (upholding a trial court's exclusion of a witness's testimony that the Court of Appeals characterized as "cumulative to that of other witnesses"); State v. Douglas, 367 S.C. 498, 521-24, 626 S.E.2d 59, 71-72 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009) (recognizing that testimony of an expert that parrots another's testimony can constitute impermissible bolstering). The trial court, however, allowed Freeman to offer such testimony indicating that it would not be cumulative or bolstering. *R.* pp. 1117-1118.

A comparison of the testimony offered by Glick and Freeman shows little contrast. *R.* pp. 728-907 with *R.* pp. 1119-1166. Glick testified that Appellant, as the developer, owed to the Waverly HOA the obligation to turn over the common areas of the project in good condition and with sufficient reserves to repair any defects that existed at the time of turnover. *R.* pp. 728-907. Freeman also testified that Appellant, as the developer, owed to the Waverly HOA the obligation to turn over the common areas of the project in good

condition and with sufficient reserves to repair any defects that existed at the time of turnover. *R.* pp. 1151-1166. Freeman presented no testimony on the issue significantly different from that of Glick. Freeman's testimony was merely duplicative and, therefore, cumulative as well as improperly bolstering. *See generally* Rule 403, *SCRE*; *Ott*, 320 S.C. at 78-79, 463 S.E.2d at 105; *Douglas*, 367 S.C. at 521-24, 626 S.E.2d at 71-72. Accordingly, the trial court abused its discretion by failing to exclude Freeman's testimony on the issue. As a result, Appellant suffered significant prejudice in the form of a needless presentation of cumulative evidence that improperly bolstered Glick's prior testimony.

2. *Freeman's Testimony Was So Tainted That He Should Never Have Been Allowed to Testify.*

In determining the admissibility of expert testimony, South Carolina courts make three inquiries. "First, the court must determine whether 'the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.'" *Graves v. CAS Medical Systems, Inc.*, 401 S.C 63, 74, 735 S.E.2d 650, 655 (2012) (quoting *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010)). "Second, the expert must have 'acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter,' although he 'need not be a specialist in the particular branch of the field." *Id.* "Finally, the substance of the testimony must be reliable." *Id.*

As demonstrated by the following quote from Freeman's trial testimony, the proffered testimony was anything but reliable:

Q: Have you ever read the deposition of Skip Lewis, the defense expert?

A: No, sir, I have not read Mr. Lewis's –

Q: Skip Lewis?

A: No, sir.

Q; Have you read the reports of JR Watkins as far as the cost to fix this project?

A; No, I haven't, but I will say that if you got to fix the project that shows it wasn't done right in the first place.

Q: Thank you, Mr. Freeman. Have you read any of the defense experts' opinions that have been rendered?

A: Only snippets of testimony. I have not attempted to read every deposition that's been taken by the Plaintiff's and I haven't read all of the defense witnesses depositions.

Q: Wouldn't be it incumbent upon you as the expert testifying as to Wieland's conduct to actually hear their side of the story?

A: You know something? I could have done that. I didn't think it was necessary because of the ***powerful things that I was hearing from the Plaintiffs' counsel and the persuasiveness of the Plaintiffs' experts reports.***

Q: Powerful things you were hearing from the ***Plaintiffs' counsel?***

A: I misspoke. I should have said experts, although I will say that the same thing is true of their counsel.

R. pp. 1163-1164 (***emphasis*** added). Freeman's testimony, by his own admission under oath, was derived solely from selected information provided to him by "Plaintiffs' counsel" and from "Plaintiffs' expert witnesses." *R.* pp. 1119-1166. He further admits that he ignored any information originating from Appellant or its experts, a tactic he admits he did purposefully. Id. Freeman was far from a credible witness and his testimony was lacking the reliability required under South Carolina law. Freeman's tainted testimony caused great prejudice to Appellant and it should not have been admitted into evidence.

III. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL.

Prior to the cases being submitted to the jury, Respondents Waverly HOA and the Class withdrew all causes of action against Appellant except those sounding in negligence. *See R.* pp. 1519-1525. As a consequence, the testimony introduced over Appellant's

objections, as discussed in detail above, had little to no relevance on the simple issue of whether JWH negligently constructed the Waverly townhomes. As a result, the objectionable evidence amounted to "piling on" and clearly tainted the perception of Appellant in the jury's eyes, a taint that could have been avoided had the trial court properly exercised its discretion and not allowed certain evidence into the record.

Respondents Waverly HOA and the Class's experts were simply not credible and presented distorted evidence in an effort to sway the jury, rather than presenting objective, reliable evidence. Glick, in addition to the developer's duties testimony discussed above, showed bias and/or lack of knowledge by testifying that:

- All of the Hardie cementitious siding needed to be removed and replaced on all of the townhomes because of the method in which it was attached, despite the fact that Hardie expressly allows for nailing reinforcement, thus negating the need to remove all of the product (*R.* pp. 887-888);

- Hurricane Matthew was not a 'hurricane" and therefore didn't have the windspeed to damage the townhomes (*R.* pp. 886-887);

- All of the steps needed to be torn out and replaced despite the fact that he only walked three (3) sets that were out of tolerance (*R.* pp. 881-883); and

- All of the windows in every townhome needed to be replaced despite the fact that he only found one (1) leak under one (1) window in the entire project (*R.* pp. 890-892).

Russell Mease, a professional engineer who testified on behalf of the Plaintiffs, testified that:

- In 100% of the buildings Mease looks at as a professional engineer he recommends a full recladding (*R.* pp. 974-975); and

- Every shingle on every roof needed to be replaced despite the fact that he only looked at 23 shingles (*R.* pp. 968-970).

Gary Moore, retained by the Plaintiffs to provide a cost of repair:

- Reduced his estimate by ***$10,000,000*** within a few days of trial (*R.* pp. 1024-1025); and

- Included an inflation factor in his estimate that was not customary in the industry (*R.* pp. 1028-1029; 1039-1041).

De Santis, whose testimony is discussed above, had no factual basis for his opinion that the units' inhabitants would have to move out while repairs were made to the townhomes. Freeman, whose testimony is also discussed at length above, showed bias and a willingness to rely on statements from Respondents Waverly HOA and the Class's attorneys rather than examining the available evidence.

The trial court should not have admitted the above-discussed testimony because it wasn't reliable expert testimony. Additionally, Glick and Freeman's testimony as to the duties of a developer was irrelevant in a simple action for negligence. As such, the trial court should have granted Appellant's motion for judgment notwithstanding the verdict or for a new trial. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990) ("Under the thirteenth juror doctrine, a trial judge may grant a new trial if she believes the verdict is unsupported by the evidence.").

IV. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO ENFORCE THE ENHANCED SETOFF AND REDUCE THE JUDGMENT BECAUSE THE ENHANCED SETOFF AROSE FROM A NEGOTIATED, GOOD FAITH AGREEMENT THAT SATISFIES RULE 43(K), *SCRCP*.

After the trial of the cases, a dispute arose when Respondents Waverly HOA and the Class's counsel reneged on their agreement to honor an "enhanced set-off" agreed upon by the Respondents Waverly HOA and the Class, Appellant, and Mora prior to trial. *See R.* pp. 1642-1643; 39-63; 1706-1801; 64-69; 1604-1630. Pursuant to that agreement, Appellant agreed to dismiss its cross-claims/third party claims against Mora in exchange for an enhanced set-off of $434,000. Id. After the trial, presumably because the Respondents Waverly HOA and the Class did not get the $20,000,000 verdict from the jury that they

expected,[10] Respondents Waverly HOA and the Class's attorneys insisted there had never been any such deal and that the only set-off they recognized as far as Mora was concerned was the amount of their settlement with Mora, $500. *Id.*

A settlement given by a plaintiff in good faith to a joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it[.]" *S.C. Code* § 15-38-50. Accordingly, a non-settling defendant has "the right to offset the value of any settlement received prior to the verdict—a right which arises by operation of law and is not within the discretion of the courts." *Smith v. Tiffany*, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017). As a result, "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[.]" *Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (Ct. App. 2012) (citing *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998)). "Section 15-38-50 grants the court no discretion in determining the equities involved in applying a [setoff] once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." *Huck v. Oakland Wings, LLC*, No. 5500, 2017 S.C. App. LEXIS 60 (Ct. App. July 19, 2017) (quoting *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008)).

Although a trial court retains inherent jurisdiction to enforce agreements in settlement of litigation before the court, *see Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992), "[i]n South Carolina jurisprudence, settlement

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[10] This is only supposition on the part of Appellant. Appellant has actually never been provided with an adequate explanation as to why Plaintiffs' attorneys reneged, only that "they never made such an agreement."

agreements are viewed as contracts," Byrd v. Livingston, 398 S.C. 237, 241, 727 S.E.2d 620, 621 (2012) (quoting Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009)), and the general rules of contract construction apply, see Mattox v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct. App. 1986).

A. *The Negotiated, Good Faith Preliminary Settlement Agreement Is Enforceable Because Its Terms Are Plain and Unequivocal and Supported by the Subsequent Conduct of the Attorneys and Parties.*

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." Pee Dee Stores, Inc., 381 S.C. at 241, 672 S.E.2d at 802 (Ct. App. 2009)(citing Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001)). Accordingly, general contract principles are applied in the construction of a settlement agreement. *Id.* at 242, 672 S.E.2d at 803. In South Carolina, e-mail is sufficient to evidence the terms of a contract. See generally Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 698 S.E.2d 773 (2010) (recognizing that email correspondence can establish an enforceable contract).

In Byrd v. Livingston, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012), this Court affirmed a trial court's enforcement of a preliminary settlement agreement where a party later refused to execute a more formal settlement agreement because the subsequent conduct of the attorneys established the parties' intent to settle. In Byrd, the parties executed an informal post-mediation settlement agreement; however, a more formal and detailed settlement agreement was never signed. Id. at 240, 727 S.E.2d at 621. The trial court, nevertheless, enforced the settlement because the attorneys' emails demonstrated the belief that the settlement was binding and the attorneys' and parties' conduct indicated that everyone believed that the case had been settled. Id. at 243, 727 S.E.2d at 623. The Byrd Court reasoned that the intention of the parties should be determined from the surrounding

circumstances and that subsequent acts are relevant to show whether a contract was intended. *Id.* After such an analysis, the trial court found it was impossible to reconcile the actions of the party refusing to comply with the agreement with the position that he did not intend to be bound by the initial agreement. *Id.* at 244, 727 S.E.2d at 623.

As in *Byrd*, Respondents Waverly HOA and the Class, Mora, and Appellant entered into a preliminary negotiated, good faith pre-trial settlement agreement. *R.* pp. 1654-1697. The agreement provided that (1) Respondents Waverly HOA and the Class would release all claims against Mora in exchange for $500 and (2) Appellant would release all claims against Mora in exchange for a setoff applied to any jury verdict against Appellant of $433,650. *Id.* Appellant had previously refused to release its claims against Mora without substantial consideration and negotiated with opposing counsel for the setoff. *See R.* pp. 1657-1659. The parties memorialized the negotiated settlement agreement in a series of e-mail correspondence bearing the e-mail addresses and electronic signature of each party's counsel. *R.* p. 1658.

Also as in *Byrd*, the more formal and detailed settlement agreement subsequently submitted to counsel for the Respondents Waverly HOA and the Class was never signed because the parties and their counsel later refused to honor the previously negotiated, good faith agreement. Nevertheless, the plain and unequivocal language of the agreement should be enforceable. Moreover, as in *Byrd*, the subsequent conduct of the parties and their counsel and the attorneys' emails demonstrate the belief that the settlement was binding. As in *Byrd*, the attorneys and parties did not further pursue the settled claims. In fact, the parties proceeded through trial without mention of Mora, whose counsel did not appear at trial.

B. The Negotiated, Good Faith Preliminary Settlement Agreement Satisfies Rule 43(k), SCRCP.

The South Carolina Rules of Civil Procedure provide in pertinent part that "[n]o agreement between counsel affecting the proceedings in an action shall be binding . . . unless made in open court and noted upon the record, **or** reduced to writing and signed by the parties and their counsel." Rule 43(k), *SCRCP* (**emphasis** added).

The negotiated, good faith preliminary settlement agreement negotiated amongst Respondents Waverly and Sills, Mora, and Appellant satisfies Rule 43(k), *SCRCP*, because the parties announced the settlement in open court for notation on the record and memorialized the agreement in writings bearing their counsel's signatures. *R.* pp. 1658-1659.

C. Failure to Enforce the Terms of the Negotiated, Good Faith Preliminary Settlement Agreement Would Violate Public Policy and Promote Withdrawals from Future Negotiated, Good Faith Settlement Agreements.

In enacting *S.C. Code Ann.* § 15-38-50, "the legislature was attempting to strike a fair balance for all involved—plaintiffs and defendants—and to do so in a way that promotes and fosters settlements." Smith v. Tiffany, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017). "[T]he Act represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" Riley v. Ford Motor Co., 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015) (quoting Chester v. S.C. Dep't of Pub. Safety, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010)). "[A] critical feature of the statute is the codification of the empty chair defense—a defendant 'retain[s] the right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages'—which necessarily contemplates lawsuits in which an allegedly

culpable person or entity is not a party to the litigation (hence the chair in question being 'empty')." *Smith*, 419 S.C. at 557, 799 S.E.2d at 484.

As Appellant had previously refused to release its claims against Mora without substantial consideration, negotiated in good faith with opposing counsel for the agreed upon setoff, and did not mention or reference Mora at trial, this Court should enforce the terms of the agreement or grant a new trial to protect Appellant's right to assert that Mora contributed to the Respondents Waverly HOA and the Class's alleged damages. Respondents Waverly HOA and the Class's refusal only after the trial to honor the previously negotiated, good faith pre-trial settlement agreement robbed Appellant of employing an empty chair defense strategy with regard to claims for work performed by Mora. Moreover, this Court should enforce the terms of the agreement to protect further South Carolina's strong public policy favoring the settlement of disputes.[11]

Based on the above, this Court should reverse the trial court and enforce the full amount of the enhanced set-off, $433,650. To do otherwise would reward dishonesty and further perpetuate the harm to Appellant caused by Respondents Waverly HOA and the Class 's attorneys' conduct.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse the trial courts' decision to deny Appellant's motion for judgment notwithstanding the verdict and/or for a new trial. The trial was rife with instances where Respondents Waverly

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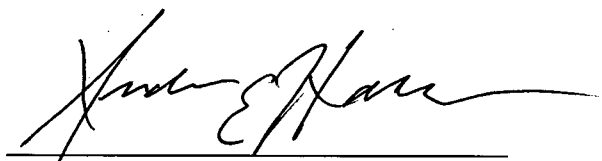
[11] Respondents Waverly HOA and the Class previously attempted to renege on a settlement entered into with other parties in this matter despite a similarly memorialized agreement being reached. *R.* pp. 100-133. After those parties sought judicial intervention, the settlements were deemed effective over Respondents Waverly HOA and the Class's objections. Id.

HOA and the Class's 'expert' witnesses were allowed to testify when the testimony should never have been allowed into evidence. There is no question that submission of that evidence to the jury resulted in a verdict far in excess of what the competent and unbiased evidence in the record indicated it should have been. Finally, even if this Court affirms the trial court with respect to its evidentiary rulings and the resulting verdict, it should still reverse the trial court's ruling on the enhanced set-off if for no other reason than to prohibit abject dishonesty.

Respectfully submitted,



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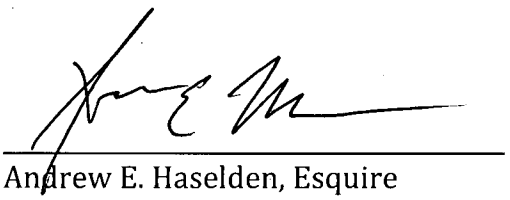
May 7, 2018

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this *Final Brief of JWH* complies with Rule 211(b), *SCRAP*.



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