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 REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

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

In support of their assertion that the Trial Court properly bifurcated the Plaintiffs' claims from Appellants' claims against the Third-Party Defendants/Subcontractors ("Subs"), Plaintiffs contend that until liability was assessed against Appellant it had no viable claims against the Third-Party Subcontractors. That claim is patently false as Appellant clearly had viable claims sounding in breach of contract against the remaining Subs that were not premised on it being liable to the Plaintiffs; they were stand-alone claims. In the *Stoneledge* case, cited by the Plaintiffs as support for their argument, the Court actually (1) performed an examination of the claims asserted by the General Contractor Defendant against its subcontractors and (2) analyzed the contracts between those parties and ascertained that they did not apply to the job in question.

In this case, the Trial Court performed neither analysis. The Trial Court merely "cleared the decks" for its own convenience to the extreme detriment of Appellant who, as a result, lost an obvious method to shift liability during trial. The fact that Appellant later resolved its crossclaims against the remaining Subs does not make this issue "moot" as Respondents conveniently claim. It merely amplifies Appellant's position that the claims should never have been bifurcated. Had they not, Appellant would not have been forced to take pennies on the dollar for claims that could have potentially shielded Appellant (in part) from a multimillion dollar verdict. To assert that Appellant has not been harmed by the Trial Court's decision

to bifurcate its claims against the remaining Subs ignores the result ultimately caused by that decision: a $7,200,000 verdict against Appellant.

2. RESPONDENTS INACCURATELY STATE THAT APPELLANT WAS NOTIFIED THAT RESPONDENTS INTENDED TO HAVE MYLES GLICK TESTIFY AS TO THE DUTIES OF A DEVELOPER TO AN HOA.

In their Brief, Respondents state incorrectly that Appellant was informed that Respondents intended to elicit testimony from Myles Glick ("Glick") as to the duties a developer owes to a constituent HOA. True, Appellant ***knew*** that the Plaintiffs would be attempting to extract such testimony from ***another expert witness***. However, the Record in this matter is clear that the Plaintiffs never, ever informed the Appellant that they ***also*** intended to have Glick testify along that line.

The notion that somehow this objection was not raised and ruled upon with sufficient specificity is ludicrous. The basis for the objection was clear: Plaintiffs never informed Appellant that they intended to use Glick's testimony to establish the duty of a developer to its constituent HOA and whether a breach of that duty occurred in this case.[1] The ruling from the Trial Court certainly was clear and succinct enough for everyone in the courtroom to understand it, even if (1) Appellant did not agree with the Trial Court's ruling and (2) Respondents take the position now that it wasn't sufficient enough to preserve the issue for appellate review.

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[1] It is important to note that Plaintiffs never produced even a shred of evidence establishing that they ever notified Appellant of their intent to use Glick in this manner. Appellant suspects that Plaintiffs did so "on the fly" in light of the fact that they were aware of many pending objections to their other expert testifying on the same topic and decided to "double down" accordingly.

Lastly, the Plaintiffs contend that Appellant was not prejudiced in any way by Glick being allowed to testify on the developer duty issue because Appellant's attorneys were allowed to cross-examine Glick at trial as to his opinions. Please allow the audacity of that assertion to sink in for a moment. Being ambushed at trial with a new line of expert testimony never previously disclosed should be completely excused because the Trial Court allowed Appellant "to cross-examine the witness . . . " *Respondents' Brief* at p. 20.

3. APPELLANT'S ATTEMPTS TO EXCLUDE THE TESTIMONY OF RESPONDENTS WAVERLY HOA AND THE CLASS'S EXPERT FRANCIS DeSANTIS ("DeSANTIS") ADDRESSING THE LOSS OF USE CLAIM WERE PRESERVED FOR REVIEW.

As Respondents essentially make no arguments on the merits with respect to whether the Trial Court erred in allowing DeSantis to testify as to loss of use that are worthy of a response, Appellant will only address issue preservation in this Reply Brief. Respondent contends that this "appeal represents the first time [Appellant] has objected to the testimony of Mr. DeSantis for the reasons stated in [Appellant's] brief." *Respondents' Brief* at p. 22. That statement is incorrect as both Appellant's Brief and the Record indicate. The nature of the objection was raised at trial and ruled upon by the Court. *See R.* pp. 1079-1082. Accordingly, this preservation argument is also without merit.

4. APPELLANT'S ATTEMPTS TO EXCLUDE THE TESTIMONY OF RESPONDENTS WAVERLY HOA AND THE CLASS'S EXPERT JOHN FREEMAN WERE PRESERVED FOR REVIEW.

Appellant relies on its Brief for the argument that the Trial Court never should have allowed Freeman to testify in an expert capacity in this case. With respect to Respondents' assertion that this issue is not preserved for appeal, Respondents' arguments ignore the issues raised and ruled upon in the Record of this case and, as such, are misplaced.

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

6. 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*.

Respondents make no arguments on the merits with respect to these two assignments of error meriting a response. As such, Appellant relies on its Brief and the arguments contained therein on these issues.

Respectfully submitted,

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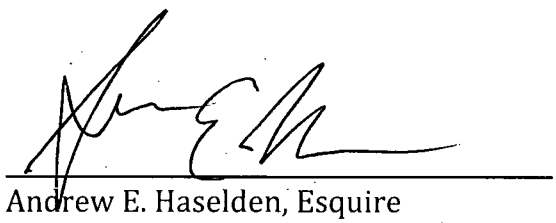
Attorneys for Appellant JWH

May 7, 2018

CERTIFICATE OF COMPLIANCE

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



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