

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-10-03326
Case No. 2014-CP-10-4335
Appellate Case No. 2017-000542

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SC Court of Appeals

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-Atlantic Group, LLC,
DBC Construction Services, LLC, Eli, Inc.,

Gerardo Rosette Sanchez a/k/a GR Painting, George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Morá a/k/a J. Mora Brick and Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, 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

George Medina, George 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 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 Sanders 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 Gillespie, 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 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 a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, 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 Gillespie, and Jared D. Overcash are the

Respondents,

And

George Medina, George 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.

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STATEMENT OF ISSUES ON APPEAL

1. **WHETHER THE TRIAL COURT ERRED IN BIFURCATING DEVELOPER'S CROSS-CLAIMS AGAINST THE THIRD-PARTY DEFENDANTS.**
2. **WHETHER THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF RESPONDENTS' EXPERT, MYLES GLICK, REGARDING THE DUTIES A DEVELOPER OWES TO A HOMEOWNERS' ASSOCIATION**
3. **WHETHER THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF RESPONDENTS' EXPERT, FRANCIS DESANTIS, AS TO THE LOSS OF USE EXPERIENCED BY RESPONDENTS.**
4. **WHETHER THE TRIAL COURT ERRED IN DENYING DEVELOPER'S MOTION TO EXCLUDE THE TESTIMONY OF RESPONDENTS' EXPERT, PROFESSOR JOHN FREEMAN.**
5. **WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL.**
6. **WHETHER THE TRIAL COURT ERRED IN DENYING DEVELOPER'S MOTION TO ENFORCE A SETOFF.**

STATEMENT OF THE CASE

On June 6, 2013, Waverly at Hamlin Plantation Townhome Association, Inc. (“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. (“Developer”). (*HOA Compl.*, R. pp. 139-146.)

On April 17, 2014, Developer responded to the complaint by generally denying the material allegations and by asserting causes of action sounding in indemnity against various third-parties that had performed work on or supplied materials for the subject project. (*Developer Answer to HOA Compl.*, R. pp. 147-167.) 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 Developer 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. (*Class Compl.*, R. pp. 182-227.) On October 6, 2014, Developer responded to the complaint by generally denying the material allegations and by asserting causes of action sounding in indemnity against various third-parties that had performed work on or supplied materials for the subject project. (*Developer Answer to Class Compl.*, R. pp. 228-252.) The various subcontractors and materials suppliers, in turn, served and filed responsive pleadings.

On December 19, 2014, the HOA added additional parties by filing an amended summons and complaint. (*HOA Am. Compl.*, R. pp. 305-322) On January 26, 2015, Developer responded to the amended complaint by generally denying the material allegations and by asserting various cross-

claims sounding in indemnity against various subcontractors and materials suppliers. (*Developer Answer to HOA Am. Compl.*, 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. (*Class Am. Compl.*, R. pp. 346-397.) On March 6, 2015, Developer responded to the amended complaint by generally denying the material allegations and by asserting various cross-claims against various subcontractors and materials suppliers sounding in indemnity. (*Developer Answer to Class Am. Compl.*, 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, (*Consent Bifurcation Orders*, May 3, 2016; R. pp. 5-12.), and executed an Order Granting Class Certification, which was filed on May 4, 2016, (*Order Granting Class Certification*, 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. (*Transcripts*, R. pp. 423-1603.)

At the conclusion of the plaintiffs' case, Developer moved for a directed verdict on various causes of action. The trial court granted Developer's motion as to all causes of action except for the Class's causes of action for negligence and breach of warranty, and HOA's causes of action for negligence and breach of fiduciary duty. (*Order Granting Directed Verdict*; R. pp. 82-99.)

Prior to submission to the jury, the HOA and the Class (together, “Respondents”) withdrew all remaining causes of action against Developer except for those sounding in negligence. (See *Trial Tr. vol. 6*, R. p. 1519, line 13 - p. 1525, line 3.) After hearing the evidence presented by both parties and deliberation, the jury returned a verdict of \$7,000,000 to HOA and \$200,000 to the Class for a total verdict of \$7,200,000. (*HOA Order.*, Feb. 9, 2017, R. pp. 39-44; *Class Order*, Feb. 9, 2017, R. pp. 45-49.) It is from those verdicts and several of the trial court’s rulings both during and after trial that Developer 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 *HOA Am. Compl.*, R. pp. 308-322; and *Class Am. Compl.*, R. pp. 349-397.) 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 (*Trial Tr. Vol. 1*, Jan. 23, 2017, R. p. 749, line 5 - p. 751, line 13.) 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. The defects alleged by HOA and the Class included, but were not limited to, lack of proper flashing, lack of proper roofing installation, moisture damage along porches, water intrusion damage resulting from defects, improper flashing installation, improper paving and drainage, and improper

window installation. (*HOA Am. Compl.*, R. pp. 308-322; *Class Am. Compl.*, R. pp. 349-397.)

John Wieland Homes and Neighborhoods of South Carolina, Inc. (“Developer”) developed the project and served as developer, construction manager, and general contractor during its construction. (*Developer Answer to HOA Am. Compl.*, R. pp. 323-343; *Developer Answer to Class Am. Compl.*, R. pp. 344 -397.) Developer, in turn, retained numerous subcontractors to perform work during construction of the project. *Id.* Developer retained control of the homeowners’ association prior to handing it over to HOA.

On June 6, 2013, Waverly at Hamlin Plantation Townhome Association, Inc. (“HOA”) filed a complaint alleging various causes of action against Developer and other related entities. (*HOA Compl.*, R. pp. 139-146.) The Waverly HOA generally claimed that numerous construction deficiencies had caused property damage affecting the long-term performance of the buildings, including the improper installation of windows, siding, handrails, roof shingles, flashing, firewalls, insulation, structural framing, and ductwork. *Id.* Developer responded to the complaint by denying all the material allegations and adding as third-party defendants several subcontractors and material suppliers. (*Developer Answer to HOA Compl.*, R. pp. 147-166.)

On July 11, 2014, Jeffery Sills, individually and as a class representative, (“Class”) filed a separate complaint alleging various causes of action against Developer and other defendants. (*Class Compl.*, R. pp. 179-227.) A class was eventually certified by the circuit court and the two cases proceeded as a single consolidated action for the purposes of discovery. (*Order Granting Class Certification*, May 4, 2016; R. pp. 13-32.) Sills was eventually replaced as the class representative after the sale of his townhome. (*Pls.’ Mot. Substitute Class Rep.*, Mar. 21, 2016; R. pp. 1631-1641; *Order Granting Class Certification*, May 4, 2016; R. pp. 13-32.) The replacement class representative, Edward Peyser, was also later replaced for the same reason by the class

representative at trial, Stephen Denby. (*Order Granting Pls. ' Mot. to Add Class Rep.*, Nov. 28, 2016; R. pp. 33-38.)

Prior to trial, HOA and the Class (together, "Respondents") reached settlements with all of the subcontractor/material suppliers except for a few that either failed to appear or simply convinced HOA, Class, and Developer that they had no potential fault for the alleged damages. Although Developer agreed to release its third-party claims against most of the subcontractor and materials suppliers, it maintained third-party claims against several parties consisting of subcontractors and/or materials suppliers. (R. pp. 423-809.) After considering several motions to bifurcate the third-party claims, the trial court bifurcated Developer's cross-claims against the third-party defendant subcontractors and materials suppliers. *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. (*Transcripts*, R. pp. 423-1603.)

At the conclusion of the case, Developer moved for a directed verdict on various causes of action. The trial court granted Developer's motion as to all causes of action except for the Class's causes of action for negligence and breach of warranty, and HOA's causes of action for negligence and breach of fiduciary duty. (*Order*; R. pp. 82-99.)

Prior to submission to the jury, HOA and the Class withdrew all remaining causes of action against Developer except for those sounding in negligence. (See *Transcript*, R. p. 1519, line 13- p. 1525, line 3.) 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. (*HOA Order.*, Feb. 9, 2017, R. pp. 39-44; *Class Order*, Feb. 9, 2017, R. pp. 45-49.)

On Feb 3, 2017, Developer Filed a Motion to Enforce Enhanced Setoff and Reduce

Judgment. (*Motion*, R. pp. 1642-1653.) On February 9, 2017, HOA and the Class filed a memorandum in opposition. (*Memo*, R. pp. 1698-1705.) On February 9, 2017, a hearing was held the motion. (R. pp., 1604-1630.) On March 3, 2017 the trial court entered a Supplemental Order denying the motion. (*Order*, R. pp. 50-63.) It is from those verdicts and several of the trial court's rulings both during and after trial that Developer appeals.

STANDARD OF REVIEW

Bifurcation of Trial

“Trial judges have discretion as to whether to bifurcate a trial.” *Wright v. Hiester Construction Co.*, 389 S.C. 504, 516, 698 S.E.2d 822, 828 (Ct. App. 2010). “This court must review a trial judge’s decision to bifurcate the issues of liability and damages under an ‘abuse of discretion’ standard.” *Creighton v. Coligny Plaza Ltd.*, 334 S.C. 96, 108, 512 S.E.2d 510 (Ct. App. 1998), citing *Keels v. Pierce*, 315 S.C. 339, 433, 433 S.E.2d 902 (Ct. App. 1993) (appellate court will not disturb trial judge’s ruling on motion to consolidate absent abuse of discretion), and *Giles v. Parker*, 304 S.C. 69, 403 S.E.2d 130 (Ct. App. 1991) (bifurcation of trial was well within trial judge’s discretion).

Qualification of Expert Witness and Admissibility of Expert Testimony

“The qualification of an expert witness and the admissibility of his or her opinion are matters within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion and a showing of prejudice.” *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 423, 717 S.E.2d 765, 775 (Ct. App. 2011) (citing *Manning v. City of Columbia*, 297 S.C. 451, 453–54, 377 S.E.2d 335, 337 (1989)); *McDill v. Mark’s Auto Sales, Inc.*, 367 S.C. 486, 490, 626 S.E.2d 52, 55 (Ct. App. 2006). “An abuse of discretion occurs when the trial court’s decision is based upon an error of law or upon factual findings that are without evidentiary support.” *Fields v. J. Haynes*

Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008) (citing *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997)).

Motion for Judgment Not Withstanding the Verdict

As the Court of Appeals stated in *Welch v. Epstein*, 342 S.C. 279, 299, 536 S.E.2d 408 (Ct. App. 2000):

When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *See, e.g., Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999); *Gastineau v. Murphy*, 331 S.C. 565, 503 S.E.2d 712 (1998). The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. *Steinke, supra*. This Court will reverse the trial court only when there is no evidence to support the ruling below. *Id.*; *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Creech, supra*; *Reiland v. Southland Equip. Serv. Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct.App.1998).

A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992). The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); *Hunter v. Staples*, 335 S.C. 93, 515 S.E.2d 261 (Ct.App.1999).

[...]

It is not the function of this Court to weigh the evidence and resolve those conflicts. In a negligence case on appeal from a jury verdict, the jurisdiction of an appellate court extends merely to the correction of errors of law and factual findings of the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the findings.

Motion for a New Trial

A circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. "The jury's determination of damages, however, is entitled to substantial deference."

RRR, Inc. v. Toggas, 378 S.C. 174, 662 S.E.2d 438, 442-43 (Ct. App. 2008). “The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives.” “Similarly, the circuit court alone has the power to grant a new trial nisi when it finds the amount of the verdict to be merely inadequate or excessive. Compelling reasons, however, must be given to justify invading the jury’s province in this manner.” *Id.*

ARGUMENT

I. THE TRIAL COURT PROPERLY BIFURCATED DEVELOPER’S CROSS-CLAIMS AGAINST THE THIRD-PARTY DEFENDANTS.

The trial court properly bifurcated the cross-claims against the third-party defendants from the main claims in the case and was fully within its discretion to do so.

Rule 42(b), SCRPC, governing bifurcation, states as follows:

The court, in furtherance of convenience **or** to avoid prejudice, **or** when separate trials will be conducive to expedition and economy, may order a separate trial of **any** claim, **cross-claim**, counterclaim, or third-party claim, or of any separate issue or of any number of claims, **cross-claims**, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the state.

Rule 42(b), SCRPC. (Emphasis added.)

“Trial judges have discretion as to whether to bifurcate a trial.” *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 516, 698 S.E.2d 822, 828 (Ct. App. 2010). “This court must review a trial judge’s decision to bifurcate the issues of liability and damages under an ‘abuse of discretion’ standard.” *Creighton v. Coligny Plaza Ltd.*, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998) (citing *Keels v. Pierce*, 315 S.C. 339, 433, 433 S.E.2d 902 (Ct. App. 1993) (an appellate court will not disturb trial judge’s ruling on motion to consolidate absent abuse of discretion); *Giles v. Parker*, 304

S.C. 69, 403 S.E.2d 130 (Ct. App. 1991) (bifurcation of trial was well within trial judge's discretion). "A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice." *Creighton v. Coligny Plaza Ltd.*, 334 S.C. 96, 108, 512 S.E.2d 510 (Ct. App. 1998) (citing *Fortune v. Gibson*, 304 S.C. 279, 403 S.E.2d 674 (Ct. App. 1991)).

In the present action, the trial court acted within its discretion in deciding to bifurcate the trial. Developer filed cross-claims against the third-party defendants. Developer's cross-claims included causes of action for indemnity, negligence, breach of warranty, and breach of contract. (*Developer's Answer to HOA Am. Compl.*, R. pp. 334-341; *Developer's Answer to Class Am. Compl.*, R. pp. 413-418.) These causes of action arise only if Developer is found liable to the HOA and the Class. (See *Muhler Co. Memorandum of Law*, R. pp. 1813-1835; *Hr'g Tr.*, R. p. 596, line 4 - p. 598, line 21.) See also, *Stoneledge at Lake Keowee Owners' Association, Inc. v. Clear View Construction LLC*, 413 S.C. 615 (Ct. App. 2015) and *Stoneledge at Lake Keowee Owners' Association, Inc. v. Builders First Source*, 412 S.C. 630 (Ct. App. 2015) (finding that cross-claims for negligence, breach of contract, and breach of warranty should be treated as claims for equitable indemnity when the potential liability arises solely from the cross-claim plaintiff's potential liability to the plaintiff). Accordingly, as a matter of judicial economy, the trial court properly bifurcated these claims to be tried in another case on another day. (*Hr'g Tr.*, R. p. 596, line 4 - p. 598, line 21.)

If the jury were to find that developer was not liable to HOA, the claims would become moot. Developer admitted this much at trial. (*Hr'g Tr.*, R. p. 429, lines 13-25; R. p. 453, line 11 - p.454, line 16.)

The trial court conducted a thorough examination of whether Developer's cross-claims should be bifurcated from the main claims. (*Hr'g Tr.*, R. p. 431, line 19 - p. 489, line 10; R. p. 596, line 4 - p. 609, line 8.) In doing so, the trial court carefully considered whether bifurcating the

claims would prejudice the parties. (*Hr'g Tr.*, R. p. 429, lines 16-22.) The trial court also considered the distinctiveness of the claims and cross-claims, noting that Developer's cross-claims sounded in indemnity. (*Hr'g Tr.*, R. p. 450, line 20 - p. 452, line 2.)

The trial court also considered the convenience, expedition and economy that bifurcating the cross-claims would afford the parties, the jury, and the trial court. (*Hr'g Tr.*, R. p. 453, line 11 - p. 454, line 16.) In addition, the trial court considered the confusion that could arise by not bifurcating the cross-claims. (*Hr'g Tr.*, R. p. 470, lines 13-20; *Hr'g Tr.*, R. p. 603, lines 20-22; R. p. 606, lines 13-16.)

Further, the trial court considered the challenges that presenting the unripe cross-claims to the jury would yield. (*Hr'g Tr.*, R. p. 472, lines 11-23; p. 474, line 2 - p. 476, line 11.) The trial court did not rush to make a determination as to whether the cross-claims should be bifurcated, but rather took time to carefully consider the arguments, the applicable law, and whether bifurcating Developer's cross-claim would yield any inconsistencies. (*Hr'g Tr.*, R. p. 486, line 24 - p. 489, line 10.)

Ultimately, the trial court properly determined that bifurcation of the Developer's cross-claims against the third-party defendants would 1) promote convenience, 2) not prejudice the parties, and 3) help to expeditiously resolve the case and serve the interests of judicial economy. (*Form 4 Orders*, R. pp. 70 - 81.) In reaching this conclusion, the trial court noted that each party's right to a jury trial on the cross-claims would be preserved. (*Hr'g Tr.*, R. p. 600, lines 17-22; R. p. 601, lines 2-3; *see also*, R. p. 598, lines 10-21.)

Developer now contends that the bifurcation resulted in significant prejudice because the bifurcation "required [Developer] to try non-distinct issues arising from the same facts and circumstances on separate occasions." (Developer Final Brief, p. 12.) Developer's argument is

unavailing for several reasons. First, establishing whether the third-party defendants are liable to Developer plays no role in establishing whether Developer is liable to HOA and the Class. The two issues are distinct. As the trial court aptly noted:

THE COURT: Because even if they [the subcontractors] did something wrong it doesn't absolve you of your oversight responsibility. The Hayes could come in – and I mean – I when I say Mr. Hayes I mean the plaintiffs. He could come in and say, guess what, all of the subs screwed up royally, but you still fell short of your responsibility to supervise their work and to make sure it was up to coed because as a general contractor and developer overall that is your responsibility.

(*Hr'g Tr.*, R. p. 454, lines 6-14.)

Second, Developer fails to demonstrate how bifurcating the claims would result in any injustice. Indeed, as the trial court noted, the cross-claims were not even ripe unless and until a judgment was entered against Developer. (*Hr'g Tr.*, R. p. 475, lines 12-13.)

Third, the trial court specifically preserved Developer's right to a jury trial on the cross-claims. (*Hr'g Tr.*, R. p. 601, lines 2-3.) Finally, Developer's argument that the trial should not have been bifurcated is moot because Developer has since dismissed its cross-claims against the third-party defendants. (*See Developer Stipulation of Dismissal with Prejudice of Cross-Claims as to Defendants George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.; the Muhler Company, Inc., and Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting*, Filed June 9, 2017, R. pp. 1836-1844.)

Because the trial court carefully considered the bifurcation issues, and determined that the bifurcation made sense for a number of reasons, the trial court did not abuse its discretion and the decision should be affirmed. *Cf. Creighton v. Coligny Plaza Ltd.*, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998) (holding that the trial court did not abuse its discretion after considering convenience, expedition, and judicial economy as required under Rule 42(b), SCRCPP).

II. THE TRIAL COURT PROPERLY ALLOWED MYLES GLICK TO TESTIFY REGARDING THE DUTIES A DEVELOPER OWES TO A HOMEOWNERS' ASSOCIATION.

A. The Trial Court Properly Qualified Mr. Glick as an Expert Witness.

“The qualification of a witness as an expert is a matter largely within the trial court’s discretion and will not be reversed absent an abuse of that discretion.” *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008) (citing *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997)). “An abuse of discretion occurs when the trial court’s decision is based upon an error of law or upon factual findings that are without evidentiary support.” *Id.* at 555, 658 S.E.2d at 85–86 (citing *Gooding*, 326 S.C. at 252, 487 S.E.2d at 598).

A person may be qualified as an expert based upon “knowledge, skill, experience, training, or education.” Rule 702, SCRE. The rule does not set forth mandatory requirements for the qualification of an expert witness, acknowledging that “there are a variety of ways in which a person can become so skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in determining a fact or in understanding the evidence.” *Teseniar v. Profl Plastering & Stucco, Inc.*, 407 S.C. 83, 754 S.E.2d 267, 271 (Ct. App. 2014) (citing *Fields*, 376 S.C. at 556, 658 S.E.2d at 86).

Here, the trial court properly qualified Mr. Glick as an expert witness in the fields of architectural design, construction, and construction administration without objection from the Developer. (*Trial Tr.*, R. p. 748, lines 1-5.) Mr. Glick was also properly qualified as an expert in the field of development over Developer’s objection. (*Trial Tr.*, R. p. 852, line 25 - p. 853, line 9; R. p. 864, lines 3-10.) Developer contends that “the trial court permitted Glick to testify regarding the developer issue without qualification” and that “Glick lacked both the experience and factual

knowledge to form a viable opinion as to whether [Developer] complied with any duties owed by developer.” (Developer Final Brief, pp. 15 -16.) Developer’s arguments are without merit and are not supported by the record.

As the record demonstrates, Mr. Glick was more than qualified to testify as an expert in the field of development. During direct examination Mr. Glick testified that he had worked both as a developer and with developers on multiple real estate projects.

Q. Good afternoon, Mr. Glick. If you would take a moment, I’d like for you to go ahead and give a little background if you don't mind so the jury has a bearing on your educational experience.

A. I think the best place to start is high school. I went to a high school that offered not only your typical high school curriculum, but it was a technical school. Offered a three-year electrical engineering, architectural, mechanical engineering curriculum. I took the architectural in high school and I graduated high school with a three-year technical degree as well as a standard high school degree. I then went to the University of Cincinnati in Cincinnati, Ohio, went to the architects program. It's a six-year program. Last four years you alternate and go to school three months, you work three months. Go to school three months. Some people call it a co-op program. So by the time you graduate you have already had four years of experience working in the field of architecture as required.

From there I then had my first job on Hilton Head and I worked for Sea Pines Development Company. I was being trained to be a developer with an architectural background. Then in 1974 the Kiawah Island Company started here in Charleston and I became a design manager.

Ultimately I became the director of design and construction. This is for seven years. **So I developed Kiawah on behalf of the Kiawah Island Company from 1974 to 1981.** In 1981 I went into my own business. I am a practicing architect. And the name of the business is Glick-Boehm & Associates. We are in our 36th year right now.

(Trial Tr., R. p. 728, line 13 - p. 729, line 23.) (Emphasis added.)

Mr. Glick also testified that he had been previously qualified as an expert in the field of development:

Q. Have you ever been qualified as an expert by a court whether it be state or federal?

A. Yes, I have been qualified as an expert in both state and federal courts.

Q. Approximately how many times?

A. Probably 12 times plus or minus. Of all those cases only 12 have gone to court.

Q. You have been an expert in development is my understanding?

A. Yes, sir. I have been qualified as an expert in development.

(Trial Tr., R. p. 733, lines 11-21.) (Emphasis added.)

In addition, Mr. Glick testified as to his experience developing real estate projects with the Sea Pines Company and Kiawah Island Company as well as developing projects on his own:

Q. Have you ever worked with developers before?

A. Yes, I have worked for a total of seven and-a-half to eight years between Sea Pines Company and Kiawah Island Company.

Q. Have you been a developer yourself?

A. Yes, I have. I developed 247 Meeting which was a class A 8000-foot office building in downtown Charleston. I eventually sold that project. I then developed 493 and 489 King Street which is both a renovation and brand new construction. It is retail with housing above as well as retail with office.

(Trial Tr., R. p. 734, lines 3-15.)

Q. Mr. Glick, Teddy Manos for Wieland. You are a developer of what? What did you develop?

A. I developed 247 Meeting Street. It's an office building. It is now the location of a boutique hotel. The Bohemian. I also developed where I am located right now which is 493 King Street and also 489 King Street which is residential housing units above retail.

Q. And you worked for a developer when?

A. I worked for developers directly from 1973 to 1981 and also where I positioned myself, I went into business myself in 1981. I probably worked with 50 developers as my initial clients because of my development background.

Q. Have you ever personally developed a multiple unit townhome complex?

A. Apartments, residential, not specifically townhomes. One is horizontal, one is vertical. It's the same thing.

(*Trial Tr.*, R. p. 735, line 12 - p. 736, line 5.) (Emphasis added.)

Given this testimony, the trial court did not abuse its discretion in qualifying Mr. Glick as an expert in the field of development. The trial court applied and analyzed the standard set forth under Rule 702, SCRE, and *Teseniar v. Profl Plastering & Stucco, Inc.*, 407 S.C. 83, 754 S.E.2d 267, 270 (Ct. App. 2014) (*Trial Tr.*, R. p. 833, lines 13-22; R. p. 834, line 18 - p. 836, line 23.) The trial court noted that Mr. Glick had extensive experience working with developers. (*Trial Tr.*, R. p. 847, lines 11-13.) The trial court also took the additional step of allowing a proffer of Mr. Glick's expertise. (*Trial Tr.*, R. p. 834, line 18 - p. 836, line 23; R. p. 837, line 16 - p. 838, line 21; R. p. 841, line 22 - p. 842, line 1.)

Ultimately, after considering Mr. Glick's testimony and hearing argument from counsel, the trial court properly determined that Mr. Glick more than met the standard and threshold established by Rule 702, SCRE, and that any objections raised by the defense as to his experience as a developer go to weight, not admissibility. (*Trial Tr.*, R. p. 852, line 25 - p. 853, line 9.) *See Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457, 463 (Ct. App. 2011) (noting that lack of firsthand knowledge goes to weight of the testimony and not its admissibility).

Accordingly, the trial court properly qualified Mr. Glick as an expert in the field of development. Developer had the opportunity to cross-examine Mr. Glick and it was up to the jury to decide how much weight to give his testimony.

B. Developer Was Not Prejudiced by Mr. Glick's Qualification as an Expert Witness.

Contrary to what Developer argues, Developer was notified that HOA intended to offer expert testimony regarding the duties owed by a developer and was not prejudiced by the trial court's decision to allow the testimony.

Generally, “[t]he admission or exclusion of evidence is a matter within the sound discretion of the trial court and **absent clear abuse**, will not be disturbed on appeal.” *Gamble v. Int’l Paper Realty Corp. of S.C.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996) (emphasis added). Also, “[w]here a party fails timely to disclose the identity of an expert witness, the question of whether the witness’[s] testimony may be received in evidence is left largely to the discretion of the trial judge.” *Tribble v. Hentz*, 285 S.C. 616, 618, 330 S.E.2d 560, 562 (Ct. App. 1985). *See also Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2011)

Developer cites *Bensch v. Davidson* in support of its argument that Mr. Glick’s testimony should have been excluded. 354 S.C. 173, 580 S.E.2d 128 (2003). In *Bensch*, the plaintiffs, in response to interrogatories propounded on them, stated that they did not plan to use **any** expert witnesses. At trial, however, the plaintiffs attempted to introduce testimony from an expert witness.

Here, Developer had knowledge that Respondents would be calling several expert witnesses at trial, including Mr. Glick. (*Developer’s Motion in Limine*, R. pp. 1802 - 1812; *Trial Tr.*, R. p. 743, lines 15-21.) At trial, Mr. Glick was qualified as an expert in the fields of architectural design, construction, and construction administration without objection from Developer. (*Trial Tr.*, R. p. 748, lines 1-5.) Developer also had knowledge that HOA and the Class would be eliciting testimony regarding a developer’s duty to a homeowner’s association. (*Trial Tr.*, R. p. 743, lines 15-21.) Accordingly, it was no surprise that expert testimony regarding a developer’s duties to an HOA would be offered at trial.

Moreover, rather than proceed with Mr. Glick’s testimony as to a developer’s duties, the trial court gave Developer the opportunity to preview Mr. Glick’s opinions:

THE COURT: [...] If you have an objection about them not having notified you, I'm going to give you access and you can find out what his opinions are. But you have deposed him several times. Is it going to make a difference to those opinions?

(*Trial Tr.*, R. p. 739, lines 1-6.)

THE COURT: So the remedy is to give him access to find out what those opinions are going to be.

(*Trial Tr.*, R. p. 743, lines 2-4.)

As a result, Mr. Glick's testimony regarding a developer's duties was postponed until the following day. In the interim, the HOA and the Class provided Developer with an outline of the testimony that Mr. Glick intended to proffer with regard to a developer's duties. (*Trial Tr.*, R. p. 843, lines 2-18.) The trial court also conducted its own inquiry as to the scope of Mr. Glick's opinions prior to admitting any testimony regarding a developer's duties:

THE COURT: What he is going to testify about setting up an HOA? What's going to be scope of the opinions you are seeking to elicit from him, Mr. Hayes?

MR. HASELDEN: **Your Honor, they sent us an e-mail last night outlining that.**

THE COURT: I will let him answer the question. Thank you.

MR. HAYES: **Your Honor, he will testify in the State of South Carolina, it is his opinion that when a developer hands over a community with common areas that they have to hand them over in one of two ways. Either without building code violations and construction defects or with enough money to fix those building code violations and defects and Waverly has done neither -- not Waverly -- Wieland Corporation.**

(*Trial Tr.*, R. p. 843, lines 2-18.) (Emphasis added.)

Because Developer had notice of Mr. Glick's testimony and was permitted to preview that testimony prior to Mr. Glick taking the stand, the trial judge acted within her discretion in allowing Mr. Glick to testify.

C. This Issue is Not Preserved for Review.

Finally, Developers' objection to Mr. Glick's testimony is not preserved for appellate review.

In *Busillo v. City of N. Charleston*, 404 S.C. 604, 609, 745 S.E.2d 142, 145 (Ct. App. 2013), the South Carolina Court of Appeals noted that an Appellant's objection over the admission of a

previously undisclosed witness was not preserved because it was not made with sufficient specificity. The Court of Appeals found that even though the trial court in *Busillo* acknowledged the pre-trial objection, the objection was not made with sufficient specificity to be preserved:

Of the three arguments the city makes on appeal, the only one even remotely presented to the trial court in the pretrial hearing was the first—that Troy “was never listed in discovery.” However, the city (1) never indicated it served discovery on Busillo, (2) never identified which interrogatory Busillo supposedly did not answer, (3) never argued Busillo's failure to respond was intentional or willful, (4) never provided the court any basis for finding a Rule 33(b) violation,² (5) never addressed any of the factors our courts have set out for considering the admissibility of testimony of a witness not named in discovery,³ and (6) never explained any basis on which the trial court could conclude the city was prejudiced by the late disclosure. Nor were any of these points apparent to the trial court during the pretrial hearing. Thus, the city did not provide the trial court any basis in the pretrial hearing on which the court could have excluded Troy’s testimony for a discovery violation. Under these circumstances, even the pretrial objection was not “made ... with sufficient specificity to inform the circuit court judge of the point.” (citing, *State v. Byers*, 392 S.C 438, 444, 710 S.E.2d 55, 58 (2011)).

Similarly, in the present case, Developer (1) never stated that it *served* discovery on respondent, (2) never *identified* which interrogatory Respondent supposedly did not answer, (3) never argued that the alleged failure to respond was *intentional or willful*, (4) never provided the court *any basis* for finding a rule 33(b) violation, (5) never addressed *any of the factors* the courts have set out for considering the admissibility of testimony of a witness not named in discovery, and (6) never explained *any basis* on which the trial court could conclude that the Appellant was prejudiced by the late disclosure.

Although Developer’s brief states that the trial court erred in denying its motion to exclude Mr. Glick’s testimony, there is no record that a written motion was filed and no record that an oral motion was made at trial. Developer merely made an objection. (*Trial Tr.*, R. p. 736, lines 16-17.) Furthermore, although Developer argues that it was prejudiced by the admission of Mr. Glick’s testimony, Developer had the opportunity to cross-examine the witness and it was for the jury to

decide how much weight to give Mr. Glick's testimony.

For these reasons, the trial court's decision allowing Mr. Glick to testify should be affirmed.

III. THE TRIAL COURT PROPERLY ALLOWED THE TESTIMONY OF FRANCIS DESANTIS AS TO LOSS OF USE.

A. The Trial Court Properly Determined that Mr. DeSantis Could Rely on Inadmissible Evidence.

Mr. DeSantis provided testimony as to the "loss of use" valuation for the period of time in which Waverly owners would not be able to inhabit their units because of repairs. (*Trial Tr.*, R. p. 1068, line 24 - p. 1104, line 6.) Developer argues that the trial court erred in admitting Mr. DeSantis' testimony regarding loss of use because "there was no evidence presented that any of the Homeowners would be unable to use their units while repairs were being made," and because the record was "devoid of any evidence to support the claim that the homeowners would have to vacate their units during any required repairs." (Developer Final Brief, p. 17.)

Developer's argument demonstrates a misapprehension of Rule 703 of the South Carolina Rules of Evidence. Specifically, Rule 703, SCRE states:

BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, **the facts or data need not be admissible in evidence.**

(Emphasis added.)

Moreover, the case of *Hundley ex rel Hundley v. App Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 529 S.E. 2d 45 (Ct. App. 2000), which is cited in Developer's own brief, further establishes that the facts or data relied upon by an expert witness in forming an opinion need not be admissible in evidence:

An expert witness may state an opinion based on facts not within his firsthand knowledge. *State v. Hutto*, 325 S.C. 221, 481 S.E.2d 432 (1997); *Ellis v. Oliver*, 323 S.C. 121, 473 S.E.2d 793 (1996); *State v. Franklin*, 318 S.C. 47, 456 S.E.2d 357 (1995); *Creed v. City of Columbia*, 310 S.C. 342, 426 S.E.2d 785 (1993); *James v. Lister*, 331 S.C. 277, 500 S.E.2d 198 (Ct.App.1998), *cert. denied*, March 5, 1999; *Halbersberg v. Berry*, 302 S.C. 97, 394 S.E.2d 7 (Ct.App.1990); *Harris v. Campbell*, 293 S.C. 85, 358 S.E.2d 719 (Ct.App.1987). **He may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions.** *Halbersberg*, 302 S.C. at 97, 394 S.E.2d at 7; see J. Dreher, *A Guide to Evidence Law in South Carolina* 20 (Thames Rev.1979). Also, **an expert may testify as to matters of hearsay for the purpose of showing what information he relied on in giving his opinion of value.** *Halbersberg*, 302 S.C. at 97, 394 S.E.2d at 7 (citing *United States v. 5139.5 Acres of Land in Aiken and Barnwell Counties*, 200 F.2d 659 (4th Cir.1952)). **The admissibility of the testimony of an expert on a fact in issue is largely within the discretion of the trial court.** *Id.*, at 97, 394 S.E.2d at 7 (citing *South Carolina Dept. of Soc. Servs. v. Bacot*, 280 S.C. 485, 313 S.E.2d 45 (Ct.App.1984)).

(Emphasis added.)

Accordingly, Mr. DeSantis did not have to base his opinion on evidence already entered into the record and could rely on information made available to him prior to trial.

Moreover, Mr. DeSantis was qualified without objection by Developer as an expert in the field of loss of use. (*Trial Tr.*, R. p. 1075, lines 12-24.) This may have been because Mr. DeSantis' qualifications as an expert in the field of loss of use have previously been acknowledged by an appellate court in South Carolina. See *Pope v. Heritage Cmty., Inc.*, 395 S.C. 404, 423, 717 S.E.2d 765, 775 (Ct. App. 2011) ("We find no error by the trial court in qualifying DeSantis as an expert in loss of use damages.").

Finally, Developer had the opportunity to cross-examine Mr. DeSantis and fully expose any flaws in his opinion. It was for the jury to decide how much weight to give Mr. DeSantis' opinion.

In denying Developer's motion to exclude Mr. DeSantis' testimony, the trial court made it clear that Developer could cross-examine Mr. DeSantis regarding the basis for his loss of value

estimation:

MR. MANOS: Certainly Mr. De Santis as a real estate agent can't talk about how long construction takes, how long people --

THE COURT: Well, he can testify about the basis of an estimation he has made. I think it really probably is a weight issue, not an admissibility issue. I think all the things you raised are issues that go to his credibility that go to the foundation of his opinion and how he arrived at an opinion and I think you can more than adequately cross-examine him on those issues. The motion to exclude the testimony is denied.

(*Trial Tr.*, R. p. 1066, line 24 - p. 1067, line 10.)

Accordingly, the trial Court did not err in denying Developer's motion to exclude Mr. DeSantis' expert testimony.

B. This Issue is Not Preserved for Review.

This appeal represents the first time Developer has objected to the testimony of Mr. DeSantis for the reasons stated in Developer's brief. Because these same objections were not made at trial, the issue is not preserved for review.

As the supreme court noted in *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693, 695 (2014):

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Furthermore, a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App.1990).

"Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." *Broom v. Southeastern Highway Contracting Co.*, 291 S.C. 93, 352 S.E.2d 302, 310 (Ct. App. 1986).

In the present case, Developer never objected to the admission of Mr. DeSantis' testimony on

the ground that “the underlying information was not easily ascertainable to DeSantis from other sources.” (Developer Final Brief, p. 19.) Developer also never objected to the admission of Mr. DeSantis’ testimony on the ground that the information relied upon by Mr. DeSantis was “not factual in nature, but rather an unsubstantiated opinion.” *Id.* Developer also claims that the trial court erred in denying its motion to exclude testimony because “the underlying information was not easily ascertainable to DeSantis from other sources” and that the information relied upon by Mr. DeSantis was “not factual in nature, but rather an unsubstantiated opinion.” *Id.*

Because these objections are new, the issue is not preserved for review.

IV. THE TRIAL COURT CORRECTLY DENIED DEVELOPER’S MOTION TO EXCLUDE THE TESTIMONY OF PROFESSOR JOHN FREEMAN.

A. Professor Freeman’s Testimony was Not Cumulative and did Not Amount to Improper Bolstering.

The trial court correctly permitted Professor Freeman to testify at trial. The testimony was not cumulative and did not constitute improper bolstering.

“The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court’s decision will not be reversed absent an abuse of discretion.” *See Fields v. Haynes Water Builders*, 658 S.E.2d 80, 376 S.C. 545 (2008). “To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury’s verdict was influenced by the challenged evidence or the lack thereof.” *Fields v. Reg. Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

Moreover, as the South Carolina Court of Appeals noted in *State v. Douglas*, 626 S.E.2d 59, 367 S.C. 498 (Ct. App. 2006). “We review a trial judge’s decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court’s

judgment.” *See also State v. Sweat*, 362 S.C. 117, 129, 606 S.E.2d 508, 514 (Ct. App. 2004) (“A trial judge’s decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances.”); *State v. Green*, 412 S.C. 65, 79, 770 S.E.2d 424, 432 (Ct. App. 2015) (same).

Here, the trial judge did not abuse her discretion in permitting Professor Freeman to testify. As the trial court properly noted, Mr. Glick and Professor Freeman offered different perspectives as to the duties of a developer. (*Trial Tr.*, R. p. 1117, line 15 – p. 1118, line 10.) Mr. Glick, a licensed architect with years of experience as a developer and forensic investigator, was qualified as an expert in the fields of architectural design, construction, construction administration, and development. (*Trial Tr.*, R. p. 748, lines 1-5.) As the record demonstrates, the bulk of Mr. Glick’s testimony focused on the construction defects plaguing the townhomes and the common areas. (*Trial Tr.*, R. p. 748 – p. 798, line 6; R. pp. 822-832.)

With regard to development duties, Mr. Glick testified that a developer who develops a Planned Unit Development (PUD) has a duty to turn over the common elements to the Property Owners Association in good repair (*i.e.*, not in substandard condition and in accordance with the building code) and that if the common elements are not turned over in good repair, the developer must fund the association with enough money to pay for the correction of the defective items. (*Trial Tr.*, R. p. 864, line 19 - p. 865, line 7.) Mr. Glick’s testimony about developer duties was of a different scope than Professor Freeman’s.

Professor Freeman, a lawyer and law professor with experience working with developers, was qualified to provide expert testimony as to the duties owed by developers in PUDs. (*Trial Tr.*, R. p. 1132, line 22 - p. 1133, line 6.) Professor Freeman was eventually qualified as an expert without objection from Developer. (Transcript, *id.*) Unlike Mr. Glick, Professor Freeman’s testimony

focused on the duties of a developer from a business and operational entity perspective, with special attention to the standard of care for corporations that act as both the developer and general contractor for a PUD. (*Trial Tr.*, R. p. 1119 - p. 1166.)

Specifically, Professor Freeman testified that corporations acting as developers of PUDs have a duty to exercise reasonable care to ensure that the development complies with code, manufacturers' instructions, zoning regulations, and property standards. (*Trial Tr.*, R. p. 1133, line 15 - p. 1134, line 4.) Professor Freeman also testified that a developer has an obligation to maintain proper records and a duty to disclose material facts about the development (including defects and problems). (*Trial Tr.*, R. p. 1134, line 6 - p. 1135, line 9.) In addition, Professor Freeman testified as to the relationship among the different Wieland corporate entities and how they share responsibility for the development of the subject PUD. (*Trial Tr.*, R. p. 1141, line 8 - p. 1142, line 1.) Lastly, Professor Freeman testified that Developer breached its duty of disclosure to the HOA and the Class by withholding information about the property's condition. (*Trial Tr.*, R. p. 1153, line 24 - p. 1155, line 4.) Although Mr. Glick and Professor Freeman both testified as to a developer's duties, they offered different perspectives on the subject.

Moreover, the trial court properly noted that Professor Freeman and Mr. Glick would offer different perspectives, which did not amount to cumulative evidence or bolstering:

THE COURT: Okay. It would appear that the objections that have been raised go to weight, not credibility. And I have not heard anything challenging Professor Freeman's underlying education, training or experience as an expert. What I hear is the scope and what I hear the objection being to is nature of the testimony which everything I have heard at this point really goes to weight, not admissibility. Both Mr. Glick and Mr. Freeman as I understood it during the previous arguments will be testifying on **different perspectives** about the duties of the developer. **So it is not cumulative. It is not bolstering.**

(*Trial Tr.*, R. p. 1117, line 15 - p. 1118, line 10.) (Emphasis added.)

Further, Professor Freeman's testimony, even if cumulative, did not meet the standard for

possible exclusion under Rule 403, SCRE, which states:

RULE 403 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is **substantially outweighed** by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Emphasis added.)

Developer claims that it “suffered significant prejudice in the form of a needless presentation of cumulative evidence that improperly bolstered Glick’s prior testimony.” (Developer Final Brief, p. 21.) Developer does not, however, demonstrate that the probative value of Professor Freeman’s testimony was substantially outweighed by the danger of unfair prejudice, nor does it show that Professor Freeman’s testimony resulted in any prejudice that could not be addressed through cross-examination.

The trial judge’s decision to permit Professor Freeman to testify should be affirmed.

B. Professor Freeman’s Testimony was Not Tainted.

Developer now argues, “Freeman’s testimony was so tainted that he should never have been allowed to testify.” (Developer Final Brief, p. 21.) Developer’s arguments are unavailing. First, the thrust of Developer’s argument is that Professor Freeman’s testimony was not reliable, and thereby tainted, because he did not review or rely upon the opinions proffered by the opposing party’s expert witnesses in formulating his own expert opinion. Developer does not cite any case law, which requires an expert witness to review or rely upon the opposing party’s experts when formulating his own opinion. Moreover, Professor Freeman was qualified with regard to “the duties owed by developers in planned unit developments.” (*Trial Tr.*, R. p. 1132, line 22 - p. 1133, line 6.) The testimony and reports of opposing counsel’s witness have no bearing on Professor Freeman’s ability

to proffer reliable testimony on the subject.

Second, although Developer now claims that Professor Freeman “should never have been allowed to testify,” Professor Freeman was qualified as an expert at trial without objection from the Developer:

HAYES: Your Honor, we would like to qualify Mr. Freeman as an expert in the field of duties owed by developers in planned unit developments.

THE COURT: Any objection or questions as to expertise?

MR. HASELDEN: Not as to that, Your Honor.

THE COURT: Without objection so admitted. You may proceed.

(*Trial Tr.*, R. p. 1132, line 22 - 1133, line 6.)

If Developer thought that Professor Freeman “should never have been allowed to testify,” it could have objected or asked questions as to his expertise when prompted by the trial court. It did not.

Third, Developer’s brief does not argue that the trial court’s decision to qualify Professor Freeman was based on an error of law, nor does it argue that the decision to qualify Professor Freeman was based on an unsupported factual finding of the court. As the South Carolina Court of Appeals stated in *Teseniar v. Prof'l Plastering & Stucco, Inc.*, 407 S.C. 83, 754 S.E.2d 267, 270 (Ct. App. 2014):

“The qualification of a witness as an expert is a matter largely within the trial court’s discretion and will not be reversed absent an abuse of that discretion.” *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008) (citing *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997)). “An abuse of discretion occurs when the trial court’s decision is based upon an error of law or upon factual findings that are without evidentiary support.” *Id.* at 555, 658 S.E.2d at 85-86 (citing *Gooding*, 326 S.C. at 252, 487 S.E.2d at 598).

Accordingly, the trial court did not abuse its discretion when it qualified Professor Freeman

as an expert.

Further, as the South Carolina Supreme Court noted in *Fields v. J. Haynes Waters Builders*, 658 S.E.2d 80, 376 S.C. 545 (2008):

[T]o 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. Reg. Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof. *id.*

Developer fails to show that admission of Professor Freeman's testimony resulted in prejudice that could not be addressed through cross-examination.

Lastly, Developer mischaracterizes Professor Freeman's testimony. For example, Developer states "Professor 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 witness.'" (Developer Final Brief, p. 22.) This statement is not supported by the record nor is it supported by the excerpted testimony provided by Developer. Professor Freeman does not state that he *solely* relied upon the information provided by Plaintiff's counsel or Plaintiff's expert witnesses. Rather, Professor Freeman states that he did not rely on the testimony provided by the opposing party's expert witnesses. (*Trial Tr.*, R. p. 1162, line 18 - p. 1164, line 15.) In any event, this is yet another matter Developer should have addressed through cross-examination.

C. This Issue Is Not Preserved for Review.

Finally, Developer's argument as to bolstering and cumulative testimony are not preserved for review because Developer failed to make a contemporaneous objection when the testimony was offered at trial.

Although Developer made a motion to exclude Professor Freeman's testimony *in its entirety* before he was called as a witness, Developer did not make a contemporaneous objection as to

bolstering or cumulative testimony once Professor Freeman was actually on the stand. (*Trial Tr.*, R. pp. 1119 - 1166) *See State v. Mueller*, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995) (“Generally, a motion in limine seeks a pretrial ruling preventing the disclosure of potentially prejudicial matter to the jury”). Because the ruling was preliminary, it was subject to change based on developments at trial. *See id.* (“A ruling on the motion is not the ultimate disposition on the admissibility of evidence. It remains subject to change based upon developments during trial.”); *State v. Forrester*, 343 S.C. 637, 642, 541 S.E. 2d 837, 840 (2001) (“[M]aking a motion in limine to exclude evidence does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.”).

In the instant case, the trial court clearly stated that the motion in limine beforehand **was not final** and that Developer would have to make contemporaneous objections so that the court could make contemporaneous rulings:

HASELDEN: **Bottom line is, Your Honor, I guess we have to hear what Professor Freeman testifies to.** I think he is going to go far afield what was really going on at the time. He is going to offer a lot of supposition based on the issues that are not before the Court.

THE COURT: I don't know. **I think you have to make a contemporaneous objection.**

MR. HASELDEN: **I will, Your Honor.**

MR. MANOS: Just for the record, Your Honor, **can we incorporate all the arguments we made in our motion in limine that was already filed?** I think Mr. Haselden –

THE COURT: There's a lot of volumes to all of this, but **if you want me to consider it you need to articulate it because a motion in limine is beforehand, it is not final. And things develop differently at trial. So if there is some basis you need to make me aware of that so I can make a contemporaneous ruling.**

(*Trial Tr.*, R. p. 1114, line 19 - p. 1116, line 13.) (Emphasis added.)

Developer did not make any objections that Professor Freeman's testimony was cumulative or bolstering when Professor Freeman offered testimony on the stand.

Moreover, Developer never moved to exclude or object to the admission of Professor Freeman's expert testimony on the ground that it "lacked reliability required under South Carolina law." (Developer Final Brief, p. 22.)

As the supreme court noted in *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693 (2014):

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Furthermore, a party cannot use a Rule 59€ motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App.1990).

"Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." *Broom v. Southeastern Highway Contracting Co.*, 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986).

In the present case, Developer did not object or move to exclude Professor Freeman's testimony on the basis that Professor Freeman's testimony was "unreliable under to South Carolina law."

Accordingly, because Developer did not make a contemporaneous objection when testimony was actually offered, and because Developer never before objected to Professor Freeman's testimony on the ground that it was "unreliable," this issue is not preserved for review.

V. THE TRIAL COURT CORRECTLY DENIED DEVELOPER'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL.

The trial court properly denied the JNOV motion because the verdict was supported by

evidence admitted at trial.

As the South Carolina Court of Appeals noted in *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000):

When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *See, e.g., Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999); *Gastineau v. Murphy*, 331 S.C. 565, 503 S.E.2d 712 (1998). The trial court **must deny** the motions when the evidence yields more than one inference or its inference is in doubt. *Steinke, supra*. This Court will reverse the trial court **only when there is no evidence to support the ruling below**. *Id.*; *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). When considering directed verdict and JNOV motions, **neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence**. *Creech, supra*; *Reiland v. Southland Equip. Serv. Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct.App.1998).

A motion for JNOV may be granted **only if no reasonable jury could have reached the challenged verdict**. *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992). The jury's verdict **will not be overturned if any evidence exists that sustains the factual findings implicit in its decision**. *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (Ct.App.2000); *Hunter v. Staples*, 335 S.C. 93, 515 S.E.2d 261 (Ct.App.1999).

[...]

It is not the function of this Court to weigh the evidence and resolve those conflicts. In a negligence case on appeal from a jury verdict, **the jurisdiction of an appellate court extends merely to the correction of errors of law and factual findings of the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the findings**.

(Emphasis added.)

Applying the above standard, the trial court properly denied Developer's motion for judgment notwithstanding the verdict. (*Form 4 Order*, Filed Feb. 9, 2017, Case No. 2014-CP-10-04335, R. pp. 45 - 49; *Form 4 Order*, Filed Feb. 9, 2017, Case No. 2013-CP-10-03326, R. pp. 39 - 44). As the trial court acknowledged, "there is more than ample evidence in the record of duty and

breach as well as damage flowing from that breach” to support a verdict for HOA and the Class. (*Trial Tr.*, R. p. 1597, line 14 - p. 1598, line 4.) Indeed, Mr. Glick and Professor Freeman offered differing perspectives on the duties owed by developers to homeowners’ associations. (*Trial Tr.*, R. p. 748 - p. 798, line 6; R. pp. 822 – 832; R. p. 1119 - 1166.) They also testified as to how Developer breached its duty to the Respondents *Id.* Mr. Glick identified a myriad of construction defects and problems affecting the townhomes. (*Trial Tr.*, R. p. 748 - p. 798, line 6; R. pp. 822 - 832.)

In addition, Mr. Russell Mease was qualified, without objection, as an expert in the field of engineering construction and building envelopes investigation. (*Trial Tr.*, R. p. 916, lines 9-18.) Mr. Mease testified as to the duties owed by general contractors. (*Trial Tr.*, R. p. 919, lines 7-24.) He also testified as to the structural issues plaguing the townhomes at Waverly, including rotting support beams. (*Trial Tr.*, R. p. 922, line 5 - p. 979, line 21.) Further, as noted above, Mr. DeSantis provided a loss of use valuation based on the time that the townhomes would be inhabitable. (*Trial Tr.*, R. p. 1068, line 24 - p. 1104, line 6.)

Mr. Gary Moore was also qualified, without objection, as an expert in the areas of general contracting, construction, and construction estimation. (*Trial Tr.*, R. p. 1014, line 23 - p. 1015, line 6.) He testified as to the cost of repairs for the numerous issues identified at the townhomes. (*Trial Tr.*, R. p. 1015, line 7 - p. 1046, line 22.) There was more than ample evidence to support the verdict and judgment in this case. Accordingly, the trial court properly denied Developer’s motion for judgment notwithstanding the verdict.

In addition, Developer does not argue that the verdict is unsupported by the evidence in this case, but rather argues that the evidence was not “credible.” (Developer Final Brief, p. 23.) As noted above, when considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or

evidence. *Creech, supra; Reiland v. Southland Equip. Serv. Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998). Accordingly, Developer's argument as to the credibility or reliability of Respondents' expert witnesses was an issue for the jury and cannot be overturned on appeal.

Contrary to what Developer contends, HOA and the Class did not withdraw all causes of action against Developer except those sounding in negligence. (Developer Final Brief, p. 22.) The trial court granted Developer's motions for directed verdict as to several causes of action. (*Order*; R. pp. 82 - 99.) The only causes of action that survived Developer's motion for directed verdict were the Class's causes of action for negligence and breach of warranty, and HOA's causes of action for negligence and breach of fiduciary duty. (*Order Granting Directed Verdict*, filed March 24, 2017, in both Case No. 2013-CP-10-3326 and Case No. 2014-CP-10-4335, R. pp. 82 - 99; *Trial Tr.*, R. p. 1241, line 4 - p. 1242, line 23.)

In any event, Developer fails to cite any authority stating that HOA was not within its rights to withdraw certain causes of action prior to submitting the case to the jury for strategic reasons, such as to simplify matters for the jury.

Accordingly, the trial court properly denied the motion for judgment notwithstanding the verdict or for a new trial.

VI. THE TRIAL COURT CORRECTLY DENIED DEVELOPER'S MOTION TO ENFORCE A SETOFF.

The trial court properly denied Developer's motion to enforce enhanced set-off because an enforceable settlement agreement did not exist. (*Suppl. Order Denying Motion for Enhanced Setoff*, R. pp. 50 - 63; *see also, H'rg Transcript*, R. pp. 1604 - 1630; and *Pl's Memo in Opposition*, R. pp. 1698-1705.)

"There can be no doubt but that the trial court retains inherent jurisdiction and power to enforce agreements entered into in settlement of litigation before that court. But even as the court

may enforce settlement, it has the inherent power to refuse to enforce settlements.” *Rock Smith Chevrolet Inc., v. Smith*, 309 S.C. 91, 419 S.E.2d 841 (Ct. App. 1992) (citing *Ozyagcilar v. Davis*, 701 F.2d 306 (S.C. 1983)).

With regard to agreements between parties, Rule 43(k) of the South Carolina Rules of Civil Procedure states:

No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRPC.

Rule 43(k) allows for agreements between counsel to be binding under four scenarios. Three of the scenarios require that the agreement be noted and entered on the record. As a fourth option, Rule 43(k) allows an agreement to be binding if an agreement is “reduced to writing and signed by the parties and their counsel.” The signature of the party to the agreement is a requirement under the plain language of Rule 43(k). Further, South Carolina courts have consistently ruled that for a settlement to be enforced, an agreement must strictly adhere to Rule 43(k). (See *Pl’s Memo in Opposition*, R. pp. 1698-1705, and *Transcript.*, R. p. 1617, line 3 - p. 1621, line 3.)

In the present case, the trial court properly determined that Developer’s motion for an enhanced set-off in the amount of \$434,000.00 failed for several reasons. First, the trial court determined that Developer’s request must be denied because no documentation existed as contemplated under Rule 43(k). (*Suppl. Order*, R. p. 53.) Although Developer urged the Court to accept a chain of e-mail correspondence as evidence of the alleged negotiated settlement, the trial court properly determined that e-mail correspondence, as evidence of a negotiated settlement, does not meet any of the four scenarios mandated by Rule 43(k). (*Suppl. Order*, R. p. 53; *Transcript*, R. p. 1610, line 25 - p. 1616, line 2; R. p. 1617, line 9 - p. 1619, line 12; R. p. 1620, line 19 - p. 1621,

line 3.)

In the alternative, Developer argued that the alleged Benjamin Mora settlement agreement concerning the enhanced set-off was memorialized, in open court on the record, and thus complies with Rule 43(k). (*Suppl. Order*, R. p. 53; *Transcript.*, R. p. 1617, line 3 - p. 1621, line 3.) Developer contended that on January 17, 2017, Respondents' counsel and Developer's counsel notified the Court, on the record, that Developer and Respondent had settled with Defendant Benjamin Mora. (*Suppl. Order*, R. p. 53.) However, after reviewing the record from both January 17, 2017 and January 23, 2017, the trial court could not discern from the record that a settlement agreement was ever articulated among Respondents, Defendant Benjamin Mora, and Developer. (*Suppl. Order*; R. pp. 53 - 54; *See also, Hr'g Tr.*, R. pp. 423-554; *Trial Tr.*, R. pp. 612 - 809.)

Further, even if a conversation mentioning the alleged settlement agreement were made on the record, the trial court properly determined that it still would not comply with Rule 43(k) because all parties needed for the agreement to be enforceable were not present. (*Suppl. Order*, R. p. 54.) In order for the alleged settlement agreement to have been made enforceable on the record, all parties would have had to be present, indicate their intention to enter into the alleged settlement agreement, and meet one of the scenarios contemplated by Rule 43(k). This would require Defendant Benjamin Mora and/or its counsel, Curtis B. Martin, Esquire, to be present as it was to be a party to this alleged settlement agreement. But on January 17, 2017, and January 23, 2017, neither Defendant Benjamin Mora nor his counsel were present. (*Suppl. Order*, R. p. 54; *Hr'g Tr.*, R. p. 424; *Trial Tr.*, R. p. 612, line 18 - p. 613, line 4.) In fact, Defendant Benjamin Mora did not make an appearance at any time throughout the proceedings even though his counsel received notice of the proceedings. (*Suppl. Order*, R. p. 54; *Hr'g Tr.*, R. p. 424; *Trial Tr.*, R. p. 612, line 18 - p. 613, line 4.)

Finally, Developer cites *Byrd v. Livingston*, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012), as

being analogous to the present situation. (*Suppl. Order*; R. p. 54.) In *Byrd*, the plaintiff entered into a contract with the defendant to purchase property after winning the bid at a live auction. *Id.* at 240, 727 S.E.2d at 621. Litigation ensued over the purchase property, and following pretrial discovery, the parties attended a mediation and signed an “Agreement in Principle” which stated that the agreement will be supplemented by a more formal and detailed written agreement. *Id.* However, the subsequent agreement was never signed. *Id.* The trial court found the agreement enforceable against the parties and ordered the parties to prepare and execute a formal settlement document. *Id.* On appeal, the Court of Appeals affirmed the trial court’s decision stating, “[w]e find no error with the court’s determination that the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intended to be bound by the Agreement.” *Id.* at 243, 727 S.E.2d at 624.

Here, the trial court properly determined that the present case is not analogous to *Byrd v. Livingston*, as Developer suggests. (*Suppl. Order*; R. p. 55.) In *Byrd*, there was a meeting of the minds that was formalized in a writing. In the present case, there is no written agreement in the record that complies with Rule 43(k). (*Suppl. Order*; R. p. 55.) The alleged written agreement at issue is a proposed settlement agreement releasing the claims against Defendant Benjamin Mora. (*Suppl. Order*; R. p. 55.) Developer’s Attorney Theodore Manos presented this release for Respondents’ Attorney I. Keith McCarty’s review and signature. (*Suppl. Order*; R. p. 55.) Even after Attorney McCarty received the proposed written settlement agreement, he refused to sign it because he did not believe it was meant for his client. (*Suppl. Order*; R. p. 55; *Hr’g Transcript*, R. p. 1619, line 11 - p. 1621, line 3.)

At the hearing, Attorney McCarty indicated to the trial court that although he had received the release, he thought the release concerned only Defendant John Wieland Homes and Defendant

Benjamin Mora. (*Suppl. Order*; R. p. 55; *Hr'g Transcript*, R. p. 1606, line 20 - p. 1608, line 15; p. 1622, line 23 - p. 1623, line 8.) This is made evident by Attorney McCarty's refusal to sign the release. (*Suppl. Order*; R. p. 55; *Hr'g Transcript*, R. p. 1619, lines 11- 14.) Accordingly, the trial court properly determined that because there is no written agreement by counsel, there is no evidence in the record to indicate that there was a meeting of the minds between the parties. (*Suppl. Order*; R. p. 55.) If anything, Attorney McCarty's confusion surrounding the proposed release agreement as well as his refusal to sign the release evidences a lack of a meeting of the minds and distinguishes the present case from *Byrd v. Livingston*.

Finally, on January 23, 2017, counsel for JMC Construction, Andrew Cole, Esq., indicated to the trial court that his client, JMC Construction, had settled with the plaintiffs. (*Suppl. Order*; R. p. 55-56; *Trial Tr.*, R. p. 676, line 23 - p. 679, line 13; see also, *Letter*, R. pp. 1845 - 1847.) He indicated to the court that this settlement agreement was memorialized in writing and noted on the record, thus complying with Rule 43(k). (*Suppl. Order*; R. p. 55-56; *Trial Tr.*, R. p. 676, line 23 - p. 679, line 13). At that time, the trial court stressed to all parties the importance of Rule 43(k) and made clear that unless there was strict compliance, agreements would not be binding. (*Suppl. Order*; R. p. 55-56; *Trial Tr.*, R. p. 678, line 14 - p. 679, line 13.) The trial court read the rule verbatim into the record to ensure that the parties had fully complied with the requirements of Rule 43(k) concerning the settlement. (*Id.*)

Because the alleged settlement agreement did not comply with Rule 43(k), the trial court did not err in denying Developer's motion for a setoff.

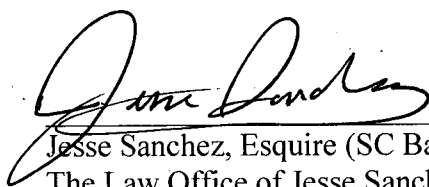
CONCLUSION

The jury verdict entered in this case should be affirmed. The verdict was reached after five days of trial and is supported by the evidence. The trial judge properly exercised her discretion in

bifurcating the trial to allow claims against Developer to be decided independently of cross-claims against the third-party defendants. Additionally, the trial judge properly exercised her discretion in allowing HOA's experts to testify at trial. Developer had the opportunity to cross-examine the experts and expose the flaws in their opinions. It was up to the jury to decide how much weight to give the testimony. Finally, the trial judge properly denied the motion for setoff because no such agreement existed.

For these reasons and those stated more fully above, Respondents respectfully request that the trial court's ruling be affirmed and the jury's verdict be permitted to stand.

Respectfully submitted,



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Charleston, South Carolina

May 11, 2018

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-10-03326
Case No. 2014-CP-10-4335
Appellate Case No. 2017-000542

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SC Court of Appeals

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-Atlantic Group, LLC,
DBC Construction Services, LLC, Eli, Inc.,

Gerardo Rosette Sanchez a/k/a GR Painting, George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick and Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, 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

George Medina, George 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 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 Gilespe, 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 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 a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, 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 Sanders 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, and Jared D. Overcash are the

Respondents,

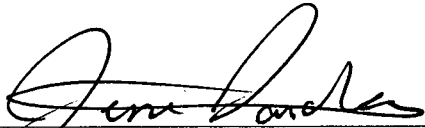
And

George Medina, George 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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents complies with Rule 211(b), SCACR.



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Charleston, South Carolina

May 11, 2018