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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Appellate Case No. 2015-000417

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., C. DAN CARSON, JEFFREY J. DAULER, JOAN W. DAVENPORT, MICHAEL FURNARI, DONNA FURNARI, JESSY B. GRASSO, NANCY E. GRASSO, ROBERT P. HAYES, LUCY H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W. HUND, III, RUTH E. ISAAC, MICHAEL D. PLOURDE, MARY LOU PLOURDE, CAROL C. POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR, AND ROBERT WHITE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

OF WHOM STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION IS THE .....RESPONDENT

V.

IMK DEVELOPMENT CO., LLC, KEOWEE TOWNHOMES, LLC, LUDWIG CORPORATION, LLC, SDI FUNDING, LLC, MEDALLION AT KEOWEE, LLC, INTEGRYS KEOWEE DEVELOPMENT, LLC, MARICK HOME BUILDERS, LLC, BOSTIC BROTHERS CONSTRUCTION, INC., MILLER/PLAYER & ASSOCIATES, BRADFORD D. SECKINGER, JOHN LUDWIG, WILLIAM C. COX, LARRY D. LOLLIS, RICK THOENNES, M. GROUP CONSTRUCTION AND DEVELOPMENT, LLC, MEL MORRIS, JOE BOSTIC, JEFF BOSTIC, CLEAR VIEW CONSTRUCTIONLLC, MICHAEL FRANZ, MHC CONTRACTORS, MIGUEL PORRAS CHONCOAS, BUILDERS FIRSSOURCE SOUTHEAST GROUP, MIKE GREEN, SOTHERN CONCRETE SPECIALITIES, CARL COMPTON D/B/A COMPTON ENTERPRISE D/B/A COMPTON ENTERPRISES, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC, COLEMAN WATERPROOFING, HEYWARD ELECTRICAL SERVICES, INC., TINSLEY ELECTRICAL, LLC, HUTCH N SON CONSTRUCTION, INC., UPSTATE UTILITIES, INC., SOUTHERN BASEMENTS, INC., CARL CATOE CONSTRUCTION, INC., T.G. CONSTRUCTION, LLC, DELFINO CONSTRUCTION, FRANCISCO JAVIER ZARATE D/B/A ZARATE CONSTRUCITON, ALEJANDRO AVALOS CRUZ, HERBERTO ACROS HERNANDEX, MARTIN HERNANDEZ-AVILES, FRANCISCO VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-RAMIREZ, ESTER MORAN MENTADO, SOCORRO CASTILLO MONTEL, UPSTATE UTILITIES, INC., MJG CONSTRUCTION AND HOMEBUILDERS, INC. D/B/A MJG CONSTRUCTION, KMAC OF THE CAROLINAS, INC., EUFACIO GARCIA, EVERADO JARMAMILLO, GARCIA PARRA INSULATION, INC., J&J CONSTRUCTION, JOSE NINO, JOSE MANUEL GARCIA, EASON CONSTRUCTION, INC. AND VINCENT MORALES D/B/A MORALES MASONRY, DEFENDANTS,

OF WHOM BOSTIC BROTHERS CONSTRUCTION, INC. IS THE .....APPELLANT

RESPONDENT'S PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent hereby files this Petition for Rehearing.

Stoneledge at Lake Keowee Owners' Association, Inc. ("Stoneledge") respectfully requests a rehearing of Opinion No. 5601 and/or the issuance of a new opinion on the issues outlined herein.

Argument

I. The Court of Appeals Erred By Re-Allocating the Jury's Cumulative Verdict of a Single Damage

a. *The Trial Judge Had Discretion with Respect to the Award of Damages and was in the best position to understand the nature of the claims, defenses and evidence concerning damages.*

In this case, Stoneledge sought recovery of one, single damage which was the cost to repair the buildings. The jury determined that that damage was $5,000,000 (less than the total claimed by Stoneledge). That single damage, the cost to repair, was the measure of damages for all of the causes of action asserted by Stoneledge against all of the Defendants. Despite the form of the jury verdict, the trial judge knew and understood that only one damage has been claimed and proven which is why, as noted by the Court of Appeals, he held that the jury verdict was a "cumulative award". The Court of Appeals correctly held that this finding was unchallenged by the Defendants and is the law of the case.

Despite acknowledging the cumulative nature of the award, the Court of Appeals made two mistakes. First it disregarded the trial court's post-trial amendment of the verdict, applying the entire verdict to each of the three causes of action, which accurately reflected that there was a single damage and that the verdict was cumulative. In doing so the Court of Appeals arbitrarily allocated the verdict as specific damages for specific causes of action. Second, the Court of Appeals then improperly, and arbitrarily applied settlement sums to parts of the verdict, which has

already been determined was cumulative, thereby violating the law which compels set off to all of the damages.

The Court of Appeals held that the single, cumulative damages award of $5,000,000 should be allocated among the causes of action, as the jury determined. The problem with this is that the jury's allocation was itself arbitrary as there was no evidence that would support a finding of particularized damages for the individual causes of action. There was no evidence that Stoneledge suffered distinct damages proximately caused by negligence and others proximately caused by a breach of warranty and other particular damages caused by a breach of fiduciary duty. Because there was no evidence of that, the allocation of the damages to specific causes of action by the jury, and by the Court of Appeals, was arbitrary. As noted by the trial judge, and by the Court of Appeals, there was only one, cumulative damage suffered by Stoneledge. The trial judge understood that and understood the falsity of the jury's attempt to parse out the damage among causes of action, which is what led to his post-trial amendment of the verdict form.

Importantly, his post-trial amendment of the verdict did not usurp the authority of the jury or change the jury's verdict. He simply applied the jury's findings, based upon his extensive observation of the trial and the evidence presented, and correctly applied their verdict, $5,000,000, as the cumulative award for a single damage that it was. See, *Vinson v. Hartley*, 342 S.C. 389, 477 S.E. 2d 715 (SC App 1996).

There was no clear error in this instance and the trial judge's post-trial amendment of the verdict form, to properly reflect the law of the case; a cumulative award for one damage, should not have been reversed.

II. The Court of Appeals Erred as a matter of law in failing to properly apply the set-off to the entire jury verdict.

In its opinion, after arbitrarily re-allocating the verdict among the causes of action, the Court of Appeals only applied the set-off to $4,000,000 of the $5,000,000 award, refusing to apply it to the $1,000,000 "verdict" for breach of fiduciary duty. This was in error and is contrary to the statutory and common law of set-off.

It is the law of the case that the damages awarded by the jury were "cumulative" and it is undisputed that all of the damages "arose out of the same factual scenario", meaning the design, construction and sale of defective buildings. As noted, there was no evidence that the damages were anything other than the cost to repair and no evidence that there were particular damages associated with any of the particular causes of action. The measure of damages for each cause of action is precisely the same; the cost to repair.

The law of set-off is clear and is articulated by the Court of Appeals in *Smith v. Widener*, 397 S.C. 468, 724 S.E. 2d 188 (SC App 2012):

> [T]here can be only one satisfaction for an injury or wrong." *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998) (internal quotation marks omitted). A settlement by a joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant." S.C.Code Ann. § 15–38–50(1) (2005). Therefore, before entering judgment ***472** on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. *Hawkins,* 330 S.C. at 113, 498 S.E.2d at 406–07. When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law. *Ellis v. Oliver,* 335 S.C. 106, 112, 515 S.E.2d 268, 271– 72 (Ct.App.1999).

Id. at 190. *See also, Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 209, 662 S.E.2d 444, 451 (Ct. App. 2008).

If the verdict is to be artificially re-allocated among the causes of action, which Stoneledge believes is not proper, the set-off ($2,855,911.77) should have been applied to the entire cumulative verdict ($5,000,000) for a net verdict of $2,144,088.23. While disagreeing with the

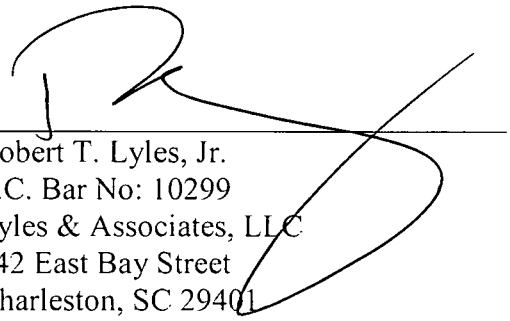
Court of Appeals reallocation of the verdict, if the verdict is reallocated as the jury allocated it the set-off, reallocated verdict should have been $1,286,452.94 for negligence, $428,817.65 for breach of warranty and $428,817.65 for breach of fiduciary duty. With the apportionment, that results in verdicts against Bostic Marick and Thoennes as follows:

Bostic:	Negligence (100%) — $1,286,452.94
	Breach of Warranty (30%) — $128,645.30
	Total: $1,415,098.24
Marick:	Negligence (40%) — $514,581.17
	Breach of Warranty(100%) — $428,817.65
	Total: $943,398.82
Thoennes:	Breach of Fiduciary Duty — $428, 817.65

CONCLUSION

For the forgoing reason, the Court of Appeals should reconsider its opinion and affirm the Trial Court's proper amendment of the verdict form to accurately reflect the jury's cumulative verdict for one damage among all causes of action and apply the set-off equally. Alternatively, the Court of Appeals should apply the set-off proportionally to all causes of action.

Respectfully submitted,



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October 25, 2018

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OF WHOM BOSTIC BROTHERS CONSTRUCTION, INC. IS THE ..... APPELLANT

PROOF OF SERVICE

I certify that I have served the Respondent's Petition for Rehearing on counsel for the Appellants by depositing a copy in the United States Mail, First Class postage prepaid, this 25th day of October, 2018, addressed to the following:

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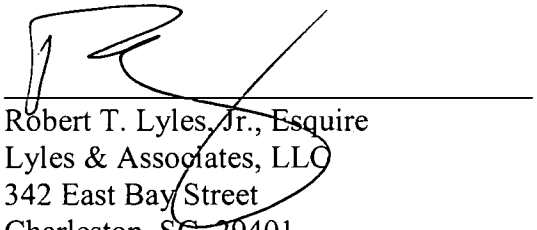

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October 25, 2018

VIA HAND-DELIVERY

V. Claire Allen, Deputy Clerk
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Stoneledge v. IMK Development (Bostic Brothers Construction, Inc.)
Appellate Case No. 2015-000417

Dear Ms. Allen:

Enclosed please find the original and seven (7) copies each of Respondent's Petition for Rehearing and Proof of Service regarding the above-referenced matter, along with this firm's check in the amount of $50.00 to cover the required filing fee. I would appreciate your filing the Petition and returning one (1) file-stamped copy to me in the envelope which is also enclosed for your convenience.

Should you have any questions concerning the enclosed, please do not hesitate to give me a call.

Thank you, and with kindest regards, I remain

Very truly yours,

LYLES & ASSOCIATES, LLC

Robert T. Lyles, Jr.

RTL/cw
Enclosures
cc: Alan Belcher, Esquire