THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Case No. 2015-000392

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

v.

IMK Development Co., LLC; Keowee Townhouses, LLC; Ludwig Corporation, LLC; SDI Funding, LLC; Medallion at Keowee, LLC; Integrys Keowee Development, LLC; Marick Home Builders, LLC; Bostic Brothers Construction, Inc.; Miller/Player & Associates; Bradford D. Seckinger; John Ludwig; William Cox; Larry D. Lollis; Rick Thoennes; M Group Construction and Development, LLC; Mel Morris; Joe Bostic; Jeff Bostic; Clear View Construction, LLC; Michael Franz; MHC Contractors; Miguel Porras Choncoas; Builders First Source-Southeast Group; Mike Green; Southern Concrete Specialties; Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises; Gunter Heating & Air; All Pro Heating, A/C & Refrigeration, LLC; Coleman Waterproofing; Heyward Electrical Services, Inc.; Tinsley Electrical, LLC; Hutch N Son Construction, Inc.; Upstate Utilities, Inc.' Southern Basements; Carl Catoe Construction, Inc; T.G. Construction, LLC; Delfino Construction; Francisco Javier Zarate d/b/a Zarate Construction; Alejandro Avalos Cruz; Herberto Acros Hernandez; Martin Hernandez-Aviles; Francisco Villalobos Lopez; Ambrosio Martinez-Ramirez; Ester Moran Mentado; Socorro Castillo Montel; MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; Eufacio Garcia; Everado Jarmamillio; Garcia Parra Insulation, Inc.; J&J Construction; Jose Nino; Jose Manuel Garcia; Eason Construction, Inc.; Vincent Morales d/b/a Morales Masonry and Miller/Player & Associates, Defendants

Of Defendants, Marick Home Builders, LLC and Rick Thoennes .....Appellants,

PETITION FOR REHEARING OF APPELLANTS MARICK HOME BUILDERS, LLC AND RICK THOENNES

Appellants Marick Home Builders, LLC and Rick Thoennes petition for rehearing of this case pursuant to Rule 221, SCACR. For reasons set forth in the Petition below, and also in the legal and factual arguments of the Appellants, Appellants respectfully submit that the opinion in this case misapprehends the law and overlooks matters in the Record.

I. JURY CHARGES

As the Court correctly pointed out "a trial court must charge the correct and current law." *Stevens v. CX Transport, Inc.* 415 S.C. 182, 197, 781 SE. 2nd 534, 542 (2005). Further, "when the Appellate Court reviews alleged errors in the jury charge, it 'must consider the court's jury charges as a whole in light of the evidence and issues presented at trial.'" *Id.* *Keyton Xrel Foster v. Greenville Hospital System*, 334 S.C. 488, 497, 514 SE. 2nd 570, 575 (1999)).

A. Liability Charge

The trial court failed to charge the jury on the proper elements of negligence for a subsequent owner for original construction defects and similar limitations for breach of the implied warranty of workmanlike service. South Carolina precedent makes it clear that a subsequent purchaser of a project cannot be liable for the existing work of a predecessor builder. In Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E. 2d 46 (1984), the South Carolina Supreme Court held that the defendant, which took over a project and undertook to repair existing defects, had a common law duty to use due care in making the repairs, but "may only be held liable for any damages proximately caused by the alleged negligent repair, but not for any original damages proximately caused by the negligence of the [original] Builder, Architect or Contractor." (emphasis added). Because the trial court in Roundtree Villas failed to properly charge the jury as to the law governing the Defendant's liability for negligent repair, the Supreme Court reversed and ordered a new trial as to the alleged

negligent repairs only. In the present case, the Court's failure to charge the jury as to the holding in Roundtree as requested by Defendants is prejudicial error to Defendants as more fully stated below.

B. Breach of Implied Warranty of Habitability Charge

Both this Court and the Homeowner's Association agree that the trial court committed error by charging the Breach of the Implied Warranty of Habitability. The charge included a sentence that stated "an implied warranty is one which is presumed to be included in every sale, whether the Defendant actually stated the promise or not." (R.p. 1946; R.p. 1968-R.p. 1969.) The Appellate Court further recognized that the jury, while deliberating, requested the trial court to provide the jury charge again. (R.p. 1946; R.p. 1968-R.p. 1969.) The trial court again repeated the charge, which included the same language. Therefore, the trial court instructed the jury erroneously once during the original charge, but then again during a specific request from the jury – which was not buried in other charges. This was after Co-Defendant, Bostic made an argument during its closing statement that Marick sold 70% of the units and Bostic only sold 30% of the units.

Bostic's counsel argued that Marick sold 70% of the units and therefore should be liable for 70% of the damages – which the jury in fact did:

> Now, as far as the allocation, the second allocation that y'all are going to have to have on the breach of warranties, the breach of warranty of workmanlike service, here's the way I think you need to look at it. All the testimony in the record says that Bostic sold/completed ten of these units. That makes them twenty-seven percent liable for that million dollar number. And I think that's fair, just and reasonable. You put us down for the ones that we sold. You put Marick down for the ones that they sold. And I think that is a fair, just and reasonable award.

(R.p. 1988.)

In this case the Appellant repeatedly requested the trial court to charge the current and correct law in a complicated, multiparty, multi week case and considering the court's jury charge as a whole in light of evidence and issues presented at trial, and the lack of clarification on that charge the jury clearly was not adequately instructed on the law South Carolina. As the Appellate Court stated it would have been helpful to include the language from Roundtree Villas in the charge and certainly would have provided more clarification to the jury about the various liabilities of all of the Defendants in this complicated multiparty case especially in light of the erroneous jury charges regarding the breach of implied warranty of habitability, the jury's request to read the implied warranty habitability charge, and Co-Defendants use of the erroneous charge of the breach of implied warranty of habitability to get exactly the result that was argued during the apportionment portion of trial.

Clearly, based on Co-Defendant's jury argument and two separate instances of erroneous jury charges, one at the request of the jury, the jury relied on the sale language suggested during Co-Defendant's closing argument during apportionment to attribute 70% of the breach of implied warranty of workmanlike service to Marick claim on the jury verdict form. If the court had read the suggested language from Roundtree and not wrongfully charged the jury, it could not have made that error. Therefore, taken as a whole the compounded errors were significant and prejudicial.

II. DIRECTED VERDICT MOTIONS

1. Breach of Implied Warranty of Workmanlike Service

Partial directed verdict should have been granted to Marick and Thoennes on the Breach of the Implied Warranty of Workmanlike Service. The only evidence relied upon by Respondent and the Appellate Court to formulate its opinion were misstated permits. No evidence was

introduced that Marick constructed foundations, waterproofings, deck design or construction, siding and window installation which is the vast majority of the damages in the case. In fact, HOA's expert testified that the repair scope from Bostic's defective construction prior to 2005 would be the same today except that there could potentially be differences in the allowances made for the damaged O.S.B. sheathing and framing which rested overtime. Id. at R.p. 987, lines 4-21. HOA's expert Hodgin testified to the following regarding the scope of repair for Bostic if Marick never came on site.

> Certain things wouldn't change at all. The need for the fire-rated walls to be correct would not change. The need for every window to be removed and reset with proper flashing would not change. The waterproofing of the foundation walls would not change. The balcony reconstruction, I don't think would change. There may have been -- you may have had some framing to salvage in the balconies in 2004. I don't know. But other than that, it would essentially be the same fix.

R.p. 1117, line 21-R.p. 1139, line 21.

John Folk prepared an estimate of repair for the HOA based upon Hodgin's scope of repair and testified the damage to the O.S.B. sheathing and framing would cost two hundred and fifty thousand dollars ($250,000.00) to repair. See R.p. 1207, lines 14-21.

Nowhere in the record or evidence, other than misstated permits, is there evidence supporting a cause of action for Implied Warranty of Workmanlike Service against Marick because Marick did not perform the original construction and therefore cannot be liable for it.

2. Proximate Cause

The Appellate Court Opinion states that Marick's expert testified the repairs identified by the HOA's expert which were attributed to Marick would cost $250,000 repair. This is a misstatement of the record. It was the HOA's experts that stated that the repairs he identified which were attributable to Marick would be sheathing and framing and would only cost $250,000. Both Derek Hodgins and John Folk were HOA experts who testified the scope of

repair necessary in 2010 was only $250,000 more than what would have been necessary if they fixed Bostic's work in 2005.

Therefore, as stated by the Appellate Court's Opinion there was no evidence that Marick's breach of the duty to investigate or repair would have caused any additional damages over $250,000. Further, this court's statement that the HOA's expert did not break down damages attributable to each Defendant is incorrect. In fact, Mr. Hodgins, HOA's expert did break down the damages between Bostic and Marick when he testified that the scope of repair resulting from the failed inspections or failure to act more quickly resulted in only rotted framing - which would cost approximately $250,000.00 according to the HOA's cost expert.

III. Breach of Fiduciary Duty

Appellant requests clarification on the breach of fiduciary duty ruling related to amalgamation, setoff, and the verdict and its applicability to Marick Homebuilders. The court found that there was a breach of fiduciary duty and stated "Marick knew about water infiltration issues, and even attempted to fix them prior to turning the HOA over to the homeowners." (R.p. 24-25, R.p 26-35) The court further stated the breach of fiduciary duty against Marick is affirmed. However, Marick was not on the board, was not on the breach of fiduciary duty jury verdict form, and therefore cannot be liable for breach of fiduciary duty if the jury did not in fact find Marick responsible for breach of fiduciary duty. This coupled with the amalgamation issue (below) makes it unclear whether Marick is responsible for a judgment for breach of fiduciary duty or if only Rick Thoennes is responsible for breach of fiduciary duty as he was the only one of these two Appellants to appear on the jury verdict form for that cause of action.

IV. Amalgamation[1]

[1] Unless the court has amalgamated Rick Thoennes with Marick under the Business Enterprises Theory.

The Court states that the Circuit Court "failed to conduct a meaningful analysis supported amalgamation of interest." However, the Court cannot amalgamate a board member with a corporation. Appellant has argued that the amalgamation and/or single business purpose analysis must be performed multiple times at multiple levels. Specifically, Bill Cox and Larry Lollis were members of IK. IK was a member of IMK. Bill Cox and Larry Lollis had nothing to do with, no ownership interest in, did not share offices with, and did not conduct the work of Marick Homebuilders or Rick Thomas. IK and its members Bill Cox and Larry Lollis had no affiliation with Marick Homebuilders other than through their joint ownership of IK which shared joint ownership of IMK. To conduct the analysis the court must find that there was amalgamation of interests between Marick Homebuilders and IK and amalgamation or business enterprise between Rick Thomas, Larry Lollis, and Bill Cox. There was no testimony or evidence that Bill Cox, Larry Lollis, and Rick Thoennes shared office space, telephones, joint employees, or unified their business operations and resources.

Mr. Thoennes testimony, which is cited in the opinion, was in response to his roles as a general contractor building new units in Phase II, a general contractor repairing units in Phase I, a board member for the entire development, and a liaison to either get the development to repair the roof, fund the homeowner's association, or fix new units and punchlist items for the new units that were constructed. Mr. Thoennes's testimony is misinterpreted to mean that he was acting as the financing arm of IMK or a representative of IK at any time.

South Carolina has no cases which amalgamate a corporation with an individual. The trial court improperly created new law in ruling that the individuals were amalgamated with the corporate entities. Applying Pertuis v. Front Roe Restaurants, Inc., 423 S.C. 640, 655, 817 S.E.2d 273, 280–81 (2018), reh'g denied (Aug. 16, 2018) the court describes the newly adopted

business enterprise theory describes a situation where "corporations" are combined. It does not speak to individuals.

Further, even applying Pertuis, the single business enterprise theory requires a showing of more than the various entities' operations are intertwined. Combining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions. Pertuis v. Front Roe Restaurants, Inc., 423 S.C. 640, 655, 817 S.E.2d 273, 280–81 (2018), reh'g denied (Aug. 16, 2018). There was no evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinction. The record is very clear that Marick did the building and IK performed the financial arm to develop Stoneledge. Marick and IK were completely foreign companies operating independently before combining resources to develop Stoneledge under a jointly held corporation: IMK. There was nothing nefarious about the relationship in the record or even suggested during the trial. The elements present in Pertrus were not present such as commingling funds or avoidance of corporate obligations. Therefore, even under the new Business Enterprise Theory IMK, IK, and Marick should not have been amalgamated or found to be engaged in business practices such that they are all the same company.

Jason M. Imhoff (S.C. Bar #: 69355)
The Ward Law Firm, P.A.
P.O. Box 5663
Spartanburg, SC 29304
Telephone (864) 582-3075
Facsimile (864) 585-3090
Attorneys for Appellants

October 25, 2018

RESPONDENTS' COUNSEL OF RECORD:

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
P. O. Box 773
Charleston, SC 29401
843-577-7730
Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

---

Case No. 2015-000392

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

v.

IMK Development Co., LLC; Keowee Townhouses, LLC; Ludwig Corporation, LLC; SDI Funding, LLC; Medallion at Keowee, LLC; Integrys Keowee Development, LLC; Marick Home Builders, LLC; Bostic Brothers Construction, Inc.; Miller/Player & Associates; Bradford D. Seckinger; John Ludwig; William Cox; Larry D. Lollis; Rick Thoennes; M Group Construction and Development, LLC; Mel Morris; Joe Bostic; Jeff Bostic; Clear View Construction, LLC; Michael Franz; MHC Contractors; Miguel Porras Choncoas; Builders First Source-Southeast Group; Mike Green; Southern Concrete Specialties; Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises; Gunter Heating & Air; All Pro Heating, A/C & Refrigeration, LLC; Coleman Waterproofing; Heyward Electrical Services, Inc.; Tinsley Electrical, LLC; Hutch N Son Construction, Inc.; Upstate Utilities, Inc.' Southern Basements; Carl Catoe Construction, Inc; T.G. Construction, LLC; Delfino Construction; Francisco Javier Zarate d/b/a Zarate Construction; Alejandro Avalos Cruz; Herberto Acros Hernandez; Martin Hernandez-Aviles; Francisco Villalobos Lopez; Ambrosio Martinez-Ramirez; Ester Moran Mentado; Socorro Castillo Montel; MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; Eufacio Garcia; Everado Jarmamillio; Garcia Parra Insulation, Inc.; J&J Construction; Jose Nino; Jose Manuel Garcia; Eason Construction, Inc.; Vincent Morales d/b/a Morales Masonry and Miller/Player & Associates, Defendants

Of Defendants, Marick Home Builders, LLC and Rick Thoennes .....Appellants,

---

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing of Appellants Marick Homes Builders, LLC and Rick Thoennes by depositing a copy of it in the United States Mail, First Class postage prepaid, on October 25, 2018, addressed to Respondents' attorneys of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, PO Box 773, Charleston, SC 2940.

Stephanie Echols

Stephanie Echols
Paralegal to Jason M. Imhoff

October 25, 2018

RESPONDENTS' COUNSEL OF RECORD:

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
P. O. Box 773
Charleston, SC 29401
843-577-7730
Attorneys for Respondents

THE WARD LAW FIRM, P.A.

ATTORNEYS AT LAW
POST OFFICE BOX 5663
SPARTANBURG, SOUTH CAROLINA 29304

H. SPENCER KING♦
K. LINDSAY TERRELL♦•
ROBERT E. DAVIS•
JASON M. IMHOFF
JOHN E. ROGERS, II•
GINGER D. GOFORTH
C. REED TEAGUE
CHAD M. GRAHAM
T. JONATHAN CLARK

♦ CERTIFIED MEDIATOR
• ALSO MEMBER NORTH CAROLINA BAR
• ALSO MEMBER GEORGIA BAR

RUFUS M. WARD (1908-1988)
L. PAUL BARNES (1931-1986)
JAMES W. HUDGENS (1940-2017)

233 SOUTH PINE STREET
SPARTANBURG, S.C. 29302
FAX. NO. (864) 585-3090

E-mail: jimhoff@wardfirm.com
Direct No. 582-3075

October 25, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11639
Columbia, SC 29211

Re: Stoneledge at Lake Keowee Owners' Association, Inc., et al. vs. IMK Development Co., LLC, et al. vs. Michael Franz, et al.
Appellate Case No: 2015-000392

Dear Ms. Kitchings,

Please find enclosed an original and six (6) copies of Appellate Marick Home Builders, LLC and Rick Thoennes' Petition for Rehearing in the above referenced matter. Also enclosed is our firm check for the filing of the said document. By a copy of this letter, I am serving the same upon the Respondents' counsel also. If you need anything further, please feel free to give me a call. Please return a clocked copy to me in the envelope provided.

Thank you for your assistance in this matter.

Sincerely,

The Ward Law Firm, PA

Jason M. Imhoff

JMI/sse
Enclosures
cc(w/encl.): Robert T. Lyles, Jr., Esquire

THE WARD LAW FIRM, P.A.

ATTORNEYS AT LAW
POST OFFICE BOX 5663
SPARTANBURG, SOUTH CAROLINA 29304

H. SPENCER KING♦
K. LINDSAY TERRELL♦·
ROBERT E. DAVIS*
JASON M. IMHOFF
JOHN E. ROGERS, II*
GINGER D. GOFORTH
C. REED TEAGUE
CHAD M. GRAHAM
T. JONATHAN CLARK

♦ CERTIFIED MEDIATOR
* ALSO MEMBER NORTH CAROLINA BAR
· ALSO MEMBER GEORGIA BAR

RUFUS M. WARD (1908-1988)
L. PAUL BARNES (1931-1986)
JAMES W. HUDGENS (1940-2017)

233 SOUTH PINE STREET
SPARTANBURG, S.C. 29302
FAX. NO. (864) 585-3090

E-mail: jimhoff@wardfirm.com
Direct No. 582-3075

October 25, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11639
Columbia, SC 29211

Re: Stoneledge at Lake Keowee Owners' Association, Inc., et al. vs. IMK Development Co., LLC, et al. vs. Michael Franz, et al.
Appellate Case No: 2015-000392

Dear Ms. Kitchings,

Please find enclosed an original and six (6) copies of Appellate Marick Home Builders, LLC and Rick Thoennes' Petition for Rehearing in the above referenced matter. Also enclosed is our firm check for the filing of the said document. By a copy of this letter, I am serving the same upon the Respondents' counsel also. If you need anything further, please feel free to give me a call. Please return a clocked copy to me in the envelope provided.

Thank you for your assistance in this matter.

Sincerely,

The Ward Law Firm, PA

Jason M. Imhoff

JMI/sse
Enclosures
cc(w/encl.): Robert T. Lyles, Jr., Esquire