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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Circuit Court Judge

Lower Court Case No. 2009-CP-37-00652
Court of Appeals 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,

Respondents,

v.

IMK Development Co., LLC, Larry D. Lollis, William C. Cox, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc., Rick Thoennes,

Defendants.

Of Whom Bostic Brothers Construction, Inc. is the Appellant.

APPELLANT'S PETITION FOR REHEARING

NOW COMES the Appellant, Bostic Brothers Construction, Inc. ("Appellant" or "Bostic"), by and through its undersigned counsel, and pursuant to Rule 221 of the South Carolina Appellate Court Rules ("SCACR"), hereby submits this petition for rehearing of this

Court's Op. No. 5601 filed on October 10, 2018, and to an extent Op. No. 5600 also filed on October 10, 2018.[1] Respondent notes the following points overlooked or misapprehended by the Court:

I. The Court's Ruling as to the Judgment Against Bostic is Unclear.

The Court's holding in Op. No. 5601 (termed *"Stoneledge II"*) "reverse[s] the trial court's set-off order and remand[s] for entry of judgment consistent with our decision in *Stoneledge I.*" However, *Stoneledge I* only addresses entry of judgment as to Marick Homebuilders, LLC ("Marick") and Thoennes, and therefore Appellant seeks clarification as to the Court's finding as to judgment against Bostic.

In *Stoneledge I,* the Court applies the set-off to the $4 million verdict, which includes negligence and breach of implied warranty, and further, apportions the remaining figure to each cause of action consistent with the jury's allocation. However, *Stoneledge I* is silent as to the judgment to be entered against Bostic. Bostic seeks clarification as to the precise figures the Court remands to the trial court for entry of judgment against Bostic, or if the Court is only entering judgment against Marick subject to contribution claims against Bostic.

II. There is a Scrivener's Error of $1 Million In the Court's Opinion.

There is a scrivener's error or a miscalculation in the application of the set-off pursuant to the Court's own holding. In *Stoneledge II,* the Court provides, "[W]e reverse the trial court's set-off order and remand for entry of judgment consistent with our decision in *Stoneledge I.*" In *Stoneledge I,* the Court determined that "none of the settlement proceeds should be set off against Thoennes' liability for breach of fiduciary duty because none of the settlement proceeds

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[1] The Court's Opinion in the instant appeal, Op. No. 5601, incorporates by reference Op. No. 5600: "Our opinion in *Stoneledge I* adequately addresses the second and third issues Bostic raises in this appeal."

would have included any amount for damages resulting from a breach of fiduciary duty. Accordingly, Thoennes is responsible for the $1 million award for breach of fiduciary duty..." Thus, "[t]he remaining $4 million verdict should be set off by the amount of the prior settlements." (emphasis added).

Herein lies the error: the Court writes "[a]fter deducting the value of the settlements, this would leave a $2,144,088.23 judgment . . ." The Plaintiffs received $2,855,911.77 from settling co-defendants. Therefore, as the Court instructs in its Opinion, if the setoff of $2,855,911.77 is subtracted from the $4 million verdict, the difference would be a $1,144,088.23 judgment (not a $2,144,088.23 judgment as written in the opinion):

$$\begin{array}{r} \$4{,}000{,}000.00 \\ -\ \$2{,}855{,}911.77 \\ \hline \$1{,}144{,}088.23 \end{array}$$

This leaves a $1,144,088.23 judgment to allocate between the negligence and breach of implied warranty causes of action. The Court then allocates three-fourths of the judgment to negligence cause of action, and one-fourth to breach of implied warranty cause action. The result is then $858,066.17 for negligence cause of action and $286,022.06 for breach of implied warranty cause of action.

According to the apportionment of fault the jury found at trial for Bostic (60% to Bostic on the negligence claim, 40% to Marick on the negligence claim, and 30% to Bostic on the breach of implied warranty claim, 70% to Marick on the breach of implied warranty claim), the judgments would be as follows:

Bostic:	$514,839.70 Negligence
	$85,806.62 Breach of Implied Warranty
Marick:	$343,226.47 Negligence

$200,215.44 Breach of Implied Warranty

Thoennes: $1 million Breach of Fiduciary Duty

Therefore, the Court should remand for entry of judgment consistent with the figures above, since the Opinion contained a miscalculation by $1 million.

III. Bostic's Motion for Directed Verdict as to Statute of Limitations.

The Court opines in *Stoneledge II* that there was testimony during trial that some homeowners, namely Steven Taylor, knew about issues including roof leaks and water intrusion as early as 2003. Mr. Taylor notified Rick Thoennes, then a member of the Stoneledge homeowners' association ("HOA") of defects in 2005. Marick undertook repairs, but it did not become apparent those repairs were inadequate until 2008/2009.

"A party has constructive notice if the party knows of facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right . . . has been invaded or that some claim against another party *might exist*." Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (Ct. App. 1998) (internal quotations omitted).

Appellant submits that the evidence shows – *even* in the light most favorable to Respondents – the homeowners originally discovered defects as early as 2003 and were on notice at that time that some claim against Bostic *might exist*. It is immaterial that Marick's repairs were not discovered to be inadequate until 2008 or 2009 when the drought ended, because the homeowners were aware as early as 2003 Bostic's original construction was inadequate so as to necessitate repairs. The fact that Marick had to repair Bostic's work at all indicated there was an issue. As provided in Barr, knowing the extent of the damage is immaterial. Barr, 330 S.C. at 645, 500 S.E.2d, at 160. Therefore, whether the homeowners appreciated the degree of the

damage is not the issue, but rather it is the fact that there were problems appearing as early as 2003 which required remedial efforts by the subsequent general contractor.

In Santee the defects were latent and undiscoverable. Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989), *overruled on other grounds*. While the defects at Stoneledge may have been hidden by stone veneers and exterior walls like the defects in Santee, unlike Santee the defects at Stoneledge were manifesting damages by way of water intrusion necessitating repairs. The only manifesting damages in Santee were cracks in the concrete, which the experts testified was common in concrete structures. Id. at 274, 384 S.E.2d at 696. Pervasive water intrusion through a building envelope is not a common condition to a home. Marick sought to repair these conditions, although the repairs were not discovered to be inadequate until 2008/2009.

Despite any assurances or repairs provided by *Marick*, undoubtedly the homeowners were on notice of a claim against *Bostic* at that time. The Court finds some of the homeowners were not on notice of the defects until after the drought ended in 2008/2009, which is the time Marick's repairs to Bostic's work failed. By its conclusion the Court tolls the statute of limitations for anyone who obtains a "permanent" repair from a third party until such a time as the "permanent" repair fails.

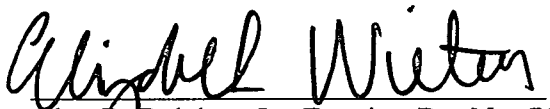
It is true there were some homeowners who had no knowledge and did not discover significant defects until 2009, however, it is certain in the very least that the HOA was on notice of a claim against Bostic as early as 2005/2006 by Mr. White and Mr. Taylor's testimony that they notified Mr. Thoennes who was a member of the HOA at that time. Importantly, the jury's $1 million verdict on the breach of fiduciary duty claim against Mr. Thoennes in his capacity as

board member is consistent with the factual finding that the HOA knew of a claim but did not act.

Conclusion

For the forgoing reasons, the Court of Appeals should reconsider its Op. No. 5601 and reverse the trial court's denial of directed verdict based upon statute of limitations, or in the alternative, correct the calculation error in applying the set-off according to the holding in its Opinion and remand for entry of judgment as to Bostic consistent with the figures provided herein.

Respectfully submitted,



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Dated: November 20, 2018

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The Honorable Alexander S. Macaulay, Circuit Court Judge

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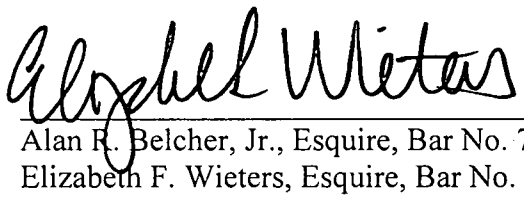
Defendants.

Of Whom Bostic Brothers Construction, Inc. is the Appellant.

PROOF OF SERVICE

I certify that I have served **Appellant's Petition for Rehearing** upon the Respondent by way of U.S. Mail, stamped First Class delivery, on November 20, 2018, addressed to Respondents' attorneys of record, addressed as follows:

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
342 East Bay
Charleston, South Carolina 29401



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November 20, 2018

VIA FEDERAL EXPRESS PRIORITY OVERNIGHT
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Clerk of Court Office
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Columbia, South Carolina 29201

RE: ***Stoneledge v. Bostic Brothers Construction, Inc.***
Lower Court Case No.: **2009-CP-37-00652**
Court of Appeals Case No.: **2015-000417**
HBS File No.: **5555.0002**

Dear Amelia:

As it pertains to the above-referenced appeal, enclosed please find the original and six copies of Appellant's Petition for Rehearing. Also enclosed is our firm's check in the amount of $50.00, representing the motion filing fee.

I have included an extra copy of the Petition and would appreciate your returning the filed copy to our office in the enclosed self-addressed stamped envelope. Thank you for your assistance in this matter. If you have any questions and/or concerns, please do not hesitate to contact our office.

Sincerely,

Elizabeth F. Wieters

EFW/bje
Enclosure
cc: Robert T. Lyles, Jr., Esquire