THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Appellate Case No. 2015-000392
Opinion Filed December 13, 2018

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; 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 Which Marick Home Builders, LLC and Rick Thoennes are the Petitioners,

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

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that Petitioner filed a Petition for Rehearing and that the Court of Appeals finally ruled on the Petition on December 13, 2018.

Petitioners Marick Home Builders, LLC and Rick Thoennes petition for certiorari of this case pursuant to Rule 242, 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.

QUESTIONS PRESENTED

I. Did the appellate court err in failing to grant Marick Home Builders, LLC's and Rick Thoennes' (hereinafter collectively referred to as "Marick") Motions for Summary Judgment and/or directed verdict as to Plaintiffs' cause of action for breach of warranty of workmanlike service due to Marick's not building any of the Phase I components at issue?

II. Did the appellate court err by finding no error by the trial court in not charging the jury that the negligence and warranty of workmanlike service could only arise from the work performed by Marick?

III. Did the appellate court err by charging the jury implied the law of warranty of habitability?

IV. Did the appellate court err by failing to grant Marick's Motions for Directed Verdict with regard to Plaintiffs' cause of action for amalgamation of interest?

V. Did the appellate court err in failing to grant Marick's Motions for Directed verdict on the issue of Marick Home Builders, LLC's and Rick Thoennes' liability in negligence, breach of implied warranty of workmanlike service and breach of fiduciary duty for lack of evidence of proximate cause with regard to Plaintiffs' damages?

VI. Did the appellate court err in failing to grant Marick's Motions for Summary Judgment and directed verdict based upon the failure of Plaintiffs to submit evidence to establish the standard of care upon which a breach of fiduciary duty claim should be assessed and the business judgment rule? Further, did the lower court err by failing to charge the jury with the proper law for breach of fiduciary duty, by failing to charge the business

judgment rule, and by effectively setting forth a strict liability standard upon the HOA board?

VII. Did the appellate court err in not clarifying whether Marick Home Builders was liable for the Breach of Fiduciary duty as opposed to Rick Thoennes?

STATEMENT OF THE CASE

Petitioners ask this Court to issue a writ of certiorari to review the Court of Appeals final decision based upon errors of law and facts in the record made by the trial court.

This appeal arises out of a multi-unit residential construction trial. The Plaintiffs filed this case in individual and representative capacities, as well as through a Property Owners Association, alleging construction defects at a townhome project in Oconee County known as Stoneledge (hereinafter "Stoneledge" or "Project"). Plaintiffs made claims against two general contractors affiliated with the Project, Marick, and its affiliated member Rick Thoennes, and Bostic Construction (hereinafter "Bostic"). Plaintiffs also sued Bostic as the developer of Phase I and IMK as the developer of Phase II. Plaintiffs alleged that the exterior roofing, stonework, cedar siding, decks, windows, doors, and foundations were defectively constructed or installed. Stoneledge consists of eighty (80) townhomes developed during two phases of construction. Only Phase I of construction is at issue in this Appeal. Bostic constructed all of the exteriors of the Phase I units alleged to be defective.

In the fall of 2013 the case was tried to verdict. On November 7, 2013, the jury returned a verdict against Marick and Thoennes for negligence, breach of warranty of workmanlike service and breach of fiduciary duty. Only one set of damages, a repair scope and estimate, was submitted by Plaintiffs against all parties on all causes of action. The jury returned a verdict for the Plaintiffs for actual damages of $3,000,000 for negligence in construction, $1,000,000 for breach of implied warranty of workmanlike service, and $1,000,000 for breach of fiduciary duty. The jury apportioned the damages amongst the parties as following:

Negligence

IMK Development Co., LLC/Marick Home Builders, LLC 40%

Bostic Brothers Construction, Inc.	60%
Implied Warranty of Workmanlike Service	
IMK Development Co., LLC/Marick Home Builders, LLC	70%
Bostic Brothers Construction, Inc.	30%
Breach of Fiduciary duty	**($1,000,000.00)**
IMK Development Co., LLC	
Integrys Keowee Development, LLC	
William C. Cox	
Larry D. Lollis	
Rick Thoennes	

Judge Macaulay initially issued a Form 4 order entering judgement against all Defendants in varying amounts dated November 8, 2013. Marick promptly filed a Motion for Reconsideration and/or to Alter/Amend Judgment pursuant to The South Carolina Rules of Civil Procedure, Rule 59(e). On January 22, 2015, Judge MaCaulay issued an Order denying Marick's Post-Trial Motions. Judge Macaulay issued a Form 4 order dated January 30, 2015 entering a "cumulative" judgment against Marick and Thoennes for $2,144,088.44. Marick again promptly filed a Motion for Reconsideration and/or to Alter/Amend Judgment pursuant to The South Carolina Rules of Civil Procedure, Rule 59(e), on the January 30, 2015 Order. Marick contemporaneously filed a Notice of Appeal on February 20, 2015. The appellate court issued its final order on October 10, 2018 and Marick filed a Petition for rehearing on October 25, 2018. That petition was finally denied on December 13, 2018.

ARGUMENT

This case was originally filed May 29, 2009 by named Plaintiff Paul H. Hund, III, M.D. an owner in Phase II (hereinafter "Hund"). (See: R.p. 133-160 and R.p. 161-199) Hund's Complaint alleged, among other things, water intrusion to the exterior cladding, improper flashing, improper use of building paper, and inadequate installation of building components in Phase II of the Project.

Upon information and belief, the Stoneledge Owners Association (hereinafter "SOA") took the position that Dr. Hund's Complaint was improper as the SOA was responsible for the exterior of the units. In November of 2009, the owners voted to retain an attorney to represent the SOA and amend the lawsuit to include the SOA and both Phase I and Phase II of the Project. Plaintiffs again alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, inadequate installation of building components, improper site work/grading, improper stone application and undisclosed latent defects.

Bostic was the general contractor for Phase I construction. Following completion of the exterior of all Phase I units and completion of a majority of the interiors of all Phase I units, Bostic terminated construction at Stoneledge. IMK purchased the development and Marick began work as general contractor in 2005 following Bostic at the Project. Evidence has been submitted that the exteriors of the Phase I buildings were already built upon Marick's arrival and Marick performed repair work at the request of unit owner's on the Phase I units. Marick also began construction of Phase II of the Project. Only one of Plaintiffs' witnesses purchased their home from IMK, the rest were purchased from Bostic or another party.

No evidence was submitted that Marick performed the construction of the exteriors Plaintiffs' sue upon. Conversely, all of the evidence at trial was that the exteriors were complete on all of the units in Phase I before Marick began work. Rick Thoenes testified:

> All of the roofs were on, and the stone was on. Siding was on. All the framing was done. Stone was on. Paving was in. Landscaping was in. Garages were in. (R.p. 1473, lines 11-18)

Rick Thonennes testified that he relied upon Bostic and the Oconee County building inspector to have done their work correctly:

> I built a lot of multi-family units and had been aware of Bostic through that construction, knew that they were a large company that had a lot of integrity. So I assumed that the project was built like it was supposed to be. And I had understood that this project was not the reason they had filed for bankruptcy. So I had no reason to believe that they would have shortcut anything.

(R.p. 1475, lines 13-20)

Plaintiff's counsel showed a photo of water damage in unit 33 throughout the trial to prove that water damage existed, but Mr. Thoennes testified that Marick never worked on that unit:

Q: You've seen and heard testimony this week repeatedly about unit thirty-three. And you said that you didn't go into unit thirty-three until – or after 2005. Will you tell the jury why? Why didn't you go into unit thirty-three after 2005?
A: Why didn't I?
Q: Yes.
A: It was unsold. I think that was the units we sold to S.D.I.
Q: You never worked in that unit; is that right?
A: I don't believe so, other than to close the windows and make sure there was –that kind of thing.
Q: And that was the one ---
A: Now, Nathan could have. I don't know. But I didn't.
Q: And that is – the photograph that has been shown to this jury throughout this trial to infer that you knew all of these water leaks were happening; right?
A: That's what the inference is, yes.
Q: But you didn't work in that unit; right?
A: Right.
Q: And ultimately it was sold, and someone else got a permit and got a certificate of occupancy and sold it to one of these homeowners?
A: That's right.
Q: You don't know what they did with those leaks or any of that?

A: No.
Q: All right.
A: That was the case in several units. I mean, we sold several units in phase one to S.D.I.

(R.p. 1498, line 17; R.p. 1499, line 24)

Plaintiff and board member Ms. Funari testified that Bostic built the exterior of her unit:

Q: Ms. Furnari—Do you understand that Marick Home Builders didn't build the exterior of your townhome?
A: I understand, yes.
Q: All right. And Marick Home Builders did not sell you your townhome?
A: That's correct.

(R.p. 586, lines 18-25)

Steve Taylor, the "mayor" of Stoneledge testified that the units were complete on the exterior before Marick arrived:

Q: And after Bostic left – well, did you know anything about the quality of construction in the unfinished units or the level of construction in the unfinished units after Bostic left?
A: No, other than the fact that they were basically, basically finished, you know. There were situations where there was a window left out or doors would swing open because they didn't have locks on them. And garage doors were open and – in other words, it just was pretty much abandoned.

(R.p. 616, lines 5-14)

Q: Why do they call you mayor of Stoneledge, Mr. Smith?
A: I was that guy that was around. You know, as I mentioned, there were only three of us. One is an elderly gentleman, and so on. And I just seemed to be the guy that people sounded off to or talked to.
Q: Yeah. You walk around the neighborhood and keep an eye on it?
A: Yeah. I'm there all the time.
Q: Pick up trash?
A: Absolutely.
Q: Let contractors in and out of buildings?
A: Yeah. That's what I do. I let you into more than one building; right?
Q: Yeah. The mayor of Stoneledge.
A: That's right.
Q: There's no question. Nobody's going to deny it, Mr. Taylor. So you're around. All right. So you're around. And when Bostic left – so, you're right. It's just your personality, isn't it? You're just kind of around. You move around a lot, don't you, Mr. Taylor?
A: Yeah, I move around.

Q: So when Bostic left, the exteriors were up, roofs were on? Stone? Right? Siding?
A: Yeah. Yeah.

(R.p. 640, lines 1-24)

Nathan Hornaday, Marick's superintendent testified that the exteriors were complete when Marick arrived on the project:

Q: If you would, describe for me the condition of phase one at Stoneledge when you arrived as a superintendent in 2005.
A: Overall condition, mainly everything was finished except for, I think, two or three units. I'm not sure. And those units had all the exterior done. They didn't have sheetrock inside of them, but I believe – I'm not sure, but I believe everything else was finished.
Q: And when you say finished, you mean roofs were on?
A: Roofs were on.
Q: Siding?
A: Siding. There were some doors and windows – excuse me—doors missing. There were some, one, two, maybe three at the most, exterior doors missing.

(R.p. 785, lines 12-25)

Q: And the porches and decks, were they finished?
A: Yes.
Q: And the screens up on the screened porch?
A: Yes.
Q: And the grading had been completed by the time you got there?
A: Yes.
Q: And were the buildings painted?
A: They were painted.
Q: What kind of shape was that in?
A: They needed to be repainted.
Q: Did you know when those units had been constructed?
A: No.
Q: Did you know who had constructed those units?
A: Yes. Well, I heard that it was Bostic.

(R.p. 786, lines 1-15)

Although building permits submitted implied Marick built from the foundation up, Rick Thoeness and Nathan Hornaday denied that any homes in Phase I were constructed from the foundation up by Marick:

Q: This one says something different. This one says, "We're going to complete the townhome from the foundation stage up to complete." Right? You see that?
A: Yes.
Q: And as you would expect, the price is a little bigger. It's eighty-four thousand five hundred sixty-three dollars and forty cents. And your fee is bigger, the four hundred dollars; right?
A: Right.
Q: So on—just taking as an example, on lot thirty-one, you have a foundation. Marick has got a foundation on its hands that y'all need to build up through completion?
A: No.
Q: Okay?
A: There wasn't a home—there wasn't one like that.

(R.p. 822, lines 1-16)

Q: Were all of the units built, all thirty-seven, all the way, roofs, shingles, stone?
A: Yes.
Q: When Marick arrived?
A: Yes.

(R.p. 829, lines 1-5)

STANDARDS OF REVIEW

The appeal involves standards of review for summary judgment, directed verdict, Motion for New Trial, Motion for Remittur and Motion to Reconsider.

SUMMARY JUDGMENT

Summary Judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. Strother v. Lexingon County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117

(1998); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct.App.197). However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. Rule 56(e), SCRCP, SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1190); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608, (Ct.App. 1999).

The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. See Baughman, 410 S.E.2d at 545-46 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is entitled to a judgment as a matter of law because the non-moving party has failed to make a sufficient showing on an essential element of their case. See Carolina Alliance for Fair Employment v. South Carolina Dept. of Labor, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999) (citing Baughman, 410 S.E.2d 537 (1991)).

DIRECTED VERDICT

In ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476-477, 514 S.E.2d 126, 130 (1999). When only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997).

If the court finds that a verdict for the party opposing the motion is not reasonably possible under the facts, the court must direct a verdict in favor of the moving party. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997). The "[c]ourt must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor." The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 188-189, 617 S.E.2d 125,130 (S.C.App. 2005). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476-477, 514 S.E.2d 126, 130 (1999). "This rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation." Hanahan v. Simpson,326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997).

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 appellate court failed to find that 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 the appellate court and the Homeowner's Association agree that the trial court committed error by charging the Breach of the Implied Warranty of Habitability and therefore the appellate court erred by finding the charge was not a significant or prejudicial error. 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. 2064; R.p. 2086; R.p. 2087). The Appellate Court further recognized that the jury, while deliberating, requested the trial court to provide the jury charge again. (R.p. 2064; R.p. 2086; R.p. 2087.) 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. 2106).

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

The appellate court failed to find that 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. 1089, 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. 1227, line 21-R.p. 1249, 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. 1317, 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 erred in failing to grant Respondent's appeal on the denial of directed verdict based upon lack of 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

The appellate court failed to clarify its opinion on the verdict's applicability to both Marick and Rick Thoennes. 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. 118-119, R.p 120-129) 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]

The appellate court erred in failing to overturn the trial court's finding of amalgamation. The appellate court stated 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

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

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.

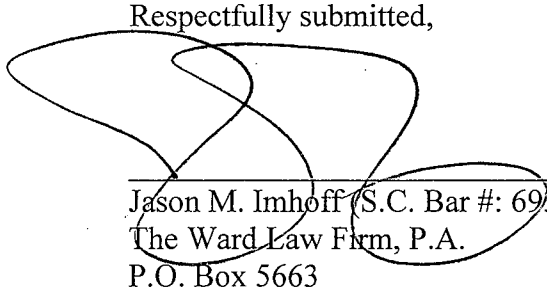
Further, even applying Pertuis, the single business enterprise theory requires a showing of more than the various entities' operations are intertwined. Combining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice 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.

CONCLUSION

For the foregoing reasons the Petitioner respectfully requests that this Court grant its petition for a writ of certiorari in this case.

Respectfully submitted,



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Attorneys for Petitioners

January 11, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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Appellate Case No. 2015-000392
Opinion Filed December 13, 2018

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 .....Petitioners,

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PROOF OF SERVICE

I certify that I have served the Appellant's Petition for A Writ of Certiorari on the Respondents by depositing a copy of same in the United States Mail, postage prepaid, addressed to Respondents' attorney of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, P. O. Box 773, Charleston, SC 29401, on January 11, 2019.

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January 11, 2019

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
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 Mr. Shearhouse,

In regards to the above-referenced matter, I am enclosing with this letter:

1. The original and six (6) copies of the Appellants/Petitioners Marick Home Builders, LLC's and Rick Thoennes' Petition for A Writ of Certiorari;

2. Two (2) copies of the Appendix, one of which is unbound;

3. Proof of Service on the Respondents;

4. The filing fee of $250.00.

I would appreciate your filing the same, and thank you for your assistance in this matter.

Sincerely,
The Ward Law Firm, PA

Jason M. Imhoff
Attorneys for Appellants/Petitioners

JMI/sse
Enclosures

cc(w/encl.): The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals

Robert T. Lyles, Jr.
Attorney for Respondents

THE WARD LAW FIRM, P.A., ATTORNEYS

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DATE : Jan/11/2019
CHE # : 65721
AMOUNT : $250.00
ACCOUNT: GENERAL - 36
PAID TO: Supreme Court of South Carolina

E112
Court Fees for filing of Petition for Certiorari of Appellants Marick

CLIENT: Build - Builders Mutual Insurance Company
MATTER: 29-0172

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THE WARD LAW FIRM, P.A.

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VOID AFTER 90 DAYS

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Jason M. Imhoff, Esquire
The Ward Law Firm, PA
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