RECEIVED
JAN 14 2019
S.C. SUPREME COURT

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,

---

APPENDIX
VOLUME I OF VIII

Jason M. Imhoff (SC Bar #: 69355)
The Ward Law Firm, PA
PO Box 5663
Spartanburg, SC 29304
(864) 582-3075
(864) 585-3090
jimhoff@wardfirm.com

Attorneys for Petitioners Marick Home Builders, LLC and Rick Thoennes

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
P. O. Box 773
Charleston, SC 29401

Attorneys for Respondents Stoneledge at Lake Keowee Owners' Association, Inc. (Plaintiffs)

INDEX

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
AUG 12 2016
SC 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 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 Defendants, Marick Home Builders, LLC and Rick Thoennes .....Appellants,

FINAL BRIEF OF APPELLANTS MARICK HOME BUILDERS, LLC AND RICK THOENNES

Jason M. Imhoff (S.C. Bar #: 69355)
C. Reed Teague (SC Bar #: 79933)
Chad M. Graham (SC Bar #: 11569)
The Ward Law Firm, P.A.
P.O. Box 5663
Spartanburg, SC 29304
Telephone (864) 582-3075
Facsimile (864) 585-3090
Attorneys for Appellants

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,

---

FINAL BRIEF OF APPELLANTS MARICK HOME BUILDERS, LLC AND RICK THOENNES

Jason M. Imhoff (S.C. Bar #: 69355)
C. Reed Teague (SC Bar #: 79933)
Chad M. Graham (SC Bar #: 11569)
The Ward Law Firm, P.A.
P.O. Box 5663
Spartanburg, SC 29304
Telephone (864) 582-3075
Facsimile (864) 585-3090
Attorneys for Appellants

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in failing to grant Marick's 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?

2. Did the lower court err by not charging the jury that the negligence and warranty of workmanlike service could only arise from the work performed by Marick?

3. Did the lower court err by charging the implied warranty of habitability?

4. Did the lower court err by upholding Plaintiffs' objection during closing?

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

6. Did the lower court err in failing to grant Marick Home Builders, LLC's, and Rick Thoennes' (hereinafter collectively referred to as "Marick") 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?

7. Did the lower court err by neglecting to direct Plaintiffs' to elect its remedy to prevent Plaintiffs' double recovery and further by entering a judgment that was not supported by Jury's verdict?

8. Did the lower court err by entering judgment against Marick and did the lower court err in the application of the setoff?

9. Did the lower 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?

STATEMENT OF THE CASE

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.

STATEMENT OF THE FACTS

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. 39-66 and R.p. 67-105) 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. 1363, 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. 1365, 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. 1388, line 17-R.p. 1389, 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. 492, 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. 514, 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. 538, 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. 683, 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. 684, 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. 720, 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. 727, lines 1-5)

STANDARDS OF REVIEW

This 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. Lexington 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).

MOTION TO RECONSIDER

It is proper to view a Rule 59(e) motion not only as a vehicle to request that the Court "alter or mend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as a 'motion for reconsideration" despite the absence of those words from the rule. "Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." Elam v. SCDOT, 361 S.C. 9, 21-22, 602 S.E.2d 772, 779 (2004), citing Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) ("purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits"); see also Curcio v. Caterpillar, Inc., 355 S.C. 316, 318, 585 S.E.2d 272, 273 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a "motion to reconsider" or "motion for reconsideration"). "There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." Elam, 361 S.C. at 21-22, 602 S.E.2d at 779.

MOTION FOR NEW TRIAL ABSOLUTE/NEW TRIAL NISI REMITTUR

Where there has been a trial by jury, a motion for new trial must be made promptly after the jury is discharged or, in the discretion of the court, no later than ten days thereafter. Rule 59(b), SCRCP. A trial judge has authority to grant a new trial outright when, sitting as the thirteenth

juror charged with the duty of seeing that justice is done, the judge is convinced the facts in the case necessitate a new trial. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). It should be noted, however, that where an order granting or denying a new trial is based solely on errors of law, it is reviewable on appeal. Southern Ry. Co. v. Coltex, Inc., 285 S.C. 213, 329 S.E.2d 736 (1985).

A trial court may grant a new trial absolute on the grounds that the verdict is excessive or inadequate. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993). If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute; the failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal the Supreme Court will grant a new trial absolute. Weir v. Citicorp Nat'l Servs., 312 S.C. 511, 435 S.E.2d 864 (1993).

A motion for a new trial or a new trial nisi is directed to the trial judge's discretion and will be upheld unless the verdict is wholly unsupported by the evidence or so excessive or inadequate as to be a result of caprice, passion, prejudice or sympathy or the result of an abuse of discretion amounting to an error of law. Jenkins v. Dixie Specialty Co., 284 S. C. 425, 326 S. E. 2d 658 (1985). Where a verdict is deemed excessive in the sense that it indicates merely undue liberality on the part of the jury, the trial judge alone has the power of setting it aside absolutely or reducing it by granting a new trial nisi. Bell v. Harrington Mfg. Co., 265 S. C. 468, 219 S. E. 2d 906 (1975).

ARGUMENTS

I. Directed verdict should have been granted on the issue of Marick's liability for Breach of the Implied Warranty of Workmanlike Service.

Appellants could not be liable for the cause of action for breach of the warranty of workmanlike service as Marick did not build the components of the Phase I buildings which are at

issue in this case. Smith v. Breedlove, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008)(A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner.); Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989) (An implied warranty of service attaches to a builder's construction of new residential housing. A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner. This is an implied warranty of workmanlike service, and is distinct from the implied warranty of habitability.); § 11-9 BUILDER/SELLER LIABILITY - IMPLIED WARRANTY OF GOOD AND WORKMANLIKE SERVICE, Anderson, S.C. Requests to Charge - Civil, § 11-9 (2009)(When a builder contracts to construct a dwelling, he gives an implied warranty that the work undertaken will be performed in a careful, diligent, workmanlike manner. This means that the townhome is constructed in a reasonably workmanlike manner. The work must be done in an ordinarily skillful manner as a skilled workman would do the work. This warranty requires the builder to use the skill that is customarily used in the industry. The builder is required to complete the construction that is reasonably expected of living quarters of comparable kind and comparable quality.) (emphasis added)

All of the testimony at trial was that the exteriors of the units were completed by Bostic, the original general contractor on Phase I of the Stoneledge Project. (See R.p. 1080, line 11-R.p. 1081, line 15; R.p. 1363, lines 8-18; R.p. 683, line 12-R.p. 684, line 15; R.p. 720, lines 1-16; R.p. 727, lines 1-5; and R.p. 514, lines 5-14)

The evidence is clear that Bostic completely built and finished the exteriors of the units for which Plaintiffs sue. To establish a claim for breach of an implied warranty of workmanlike service, a Plaintiff must show that the builder failed to perform its work in a careful, diligent, and

workmanlike manner. Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), reh'g denied (Apr. 20, 2012). There was no evidence presented that Marick constructed the defective exteriors of the units and thus no cause of action for breach of an implied warranty of workmanlike service could be found.

Derek Hodgin, Plaintiffs' forensic engineer, further testified that Marick was reasonable in relying upon the Oconee County building inspector to have performed his inspection prior to Marick's involvement. See R.p. 186, line 5-R.p. 1089, line 16. Marick was also reasonable when it walked on the project in 2005 to believe that Bostic performed its work correctly. Hodgin further admitted that Marick was reasonable to rely on the subcontractors Bostic used to perform work such as the waterproofing, foundation, framing and fireproofing subcontractors. Id.

Hodgin testified that a general contractor coming onto a project following another general contractor did not need to deconstruct the building to look for issues, but only to make repairs to areas that were openly and obviously defective. Hodgin admitted that water intrusion could take years to become readily observable. See R.p. 1093, lines 4-16. The only way for a general contractor to become aware of previous defective construction is if that construction is readily observable. Id at R.p. 1086, line 5-R.p. 1089, line 16. Hodgin found the defects at the project through destructive testing to observe latent defects that were otherwise hidden behind components of the units. See R.p. 1089, line 23-R.p. 1092, line 3. Hodgin did not provide evidence and, in fact, was unaware of the repairs performed by Marick on Phase I of the project. See R.p. 1106, line 20-R.p. 1109, line 27. Further, water staining in one unit was not observed by Marick.

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." 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.

Based upon the clear evidence in the case, Marick could not be liable for breach of an implied warranty of workmanlike service for work done by Bostic which included all of the exterior work on the buildings. No evidence was submitted or argued regarding the scope or cost of improper repairs made by Marick. Therefore, the jury should not have been charged implied warranty of workmanlike service as to Marick and a directed verdict should have been granted for Marick on that cause of action for any work not performed by it.

II. **It was error to fail to charge the jury that the claim for Negligence and Warranty of Workmanlike Service as to Marick could only arise from the work performed by Marick**

The trial court failed to charge the jury on the proper elements of negligence for a subsequent owner for original construction defects or similar limitations for breach of the implied warranty of workmanlike service, as set forth above. South Carolina precedent makes 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." 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.

III. It was error to charge the jury Warranty of Habitability

The jury should not have been charged implied warranty of habitability. The cause of action for breach of the implied warranty of habitability was dismissed prior to trial. (See R.p.11-R.p. 16). During the charge for both liability and apportionment, Judge McCauley charged the jury the law on warranty of habitability twice and advised the jury that it arose from the "sale" of the units. (R.p. 1946; R.p. 1968-R.p. 1969.) Judge McCauley instructed the jury that the warranty is "presumed to be included in every sale". Thereafter, 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.

Accordingly, the jury's apportionment of damages for these causes of action is clearly erroneous, and is likely based on juror confusion arising from the Court's erroneous charge of inapplicable law as well as the Court's refusal to charge the applicable law.

"Under the 'thirteenth juror' doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict." Vinson v. Hartley, 324 S.C. 389, 402, 477 S.E.2d 715, 722 (Ct.App. 1996). "[T]he trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality." *Id.* at 403, 477 S.E.2d at 722. "The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion." *Id.* at 403-04, 477 S.E.2d at 722 (citations omitted). The discretion afforded the trial judge is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them..." *Id.* at 404, 477 S.E.2d at 723 (citation omitted). When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice. Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000). If the amount of the verdict is so grossly inadequate or excessive that it shocks the conscience of the court and clearly indicates the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives, the trial judge is required to grant a new trial absolute. *Id.* Based upon the above, a new trial should have been granted.

IV. It was error to prevent counsel from impeaching Plaintiff's expert during closing arguments

The trial court erred by limiting the closing argument of defense counsel for failure to impeach an expert with his deposition, as there was no need to impeach that expert due to his

admission in response to counsel's question. Judge McCauley upheld an objection to the closing argument regarding Plaintiff's expert's credibility due to a contrary argument made in another case despite that expert's admission during cross examination that his opinion was different in the other case:

> I took Mr. Hodgin's deposition in this case. And as you know, as you've heard, his repair scope is to tear it all down. Tear it all off. You heard Rick Moore say his scope takes all of this stone off, all of the cedar siding, all of the cedar roof, framing, everything, whether it's wet, ruined, perfect, pristine, take it all off. That was his testimony. I took his deposition in this case. He said tear it all down. He worked for plaintiffs eleven days later. Eleven. I was in a deposition. He was hired by a defendant ---
>
> Mr. Lyles: Your Honor, I would object to this argument. He's testifying about a deposition that he took with Derek Hodgin in another case.
>
> Mr. Imhoff: I asked him about this, Your Honor, on the stand. He admitted it. It's in the testimony.
>
> The Court: What's the relevance to this case?
>
> Mr. Imhoff: Credibility, Your Honor. Credibility.
>
> The Court: Did you ask him – did you challenge him under Rule 613? Did you show him what he had said?
>
> Mr. Imhoff: I asked ---
>
> The Court: It was a deposition? It was written. The rules require that you do that in order to impeach your witness' credibility.
>
> Mr. Imhoff: Your Honor, I have the deposition with me.
>
> The Court: Well, you didn't use it at the time, so I'm going to tell the jury to disregard anything that has to do with a deposition because the rules provide that if you're going to challenge a person's answer to the question, did you make this statement, they have the right to explain their answer. And he's not here today to do it. That's beyond the scope of proper arguments. And I'm going to direct you

to disregard anything about credibility of the witness based on a prior inconsistent – alleged inconsistency.

R.p. 1883, line 23-R.p. 1885, line 10)

That expert had previously admitted during cross-examination that he had testified differently in another case.

Q: You worked for the contractor and developer in a case called Ravines at Creekside; is that right, Mr. Hodgin?
A: Yes, sir.
Q: And that was similar construction, wasn't it? Asphalt shingle roof, lap siding, stone?
A: Yes.
Q: Right? And you testified in that case that not all of the roofs, not all of the siding and all of the stone had to come off; correct?
A: That's correct.
Q: And you were paid by the defendant in that case for that opinion; correct?
A: It's not for the opinion. It's for the time, yeah.
Q: And, Mr. Hodgin, were you deposed in that case?
A: Yes.
Q: And when you testified that the shingles, roof, siding, and stone did not all need to come off, that was eleven days after I took your deposition in this case, wasn't it?
A: I don't know. If you say that's what it was.

R.p. 1120, line 9-R.p. 1121, line 4

The court further demanded that defense counsel "move on" while arguing credibility of Plaintiffs' expert for failure to identify that 7 units at the project did not have decks. For all of the forgoing, in addition to those made at or before trial, the Jury was clearly misled.

V. The trial court erroneously found that Defendants Marick, IMK, IKD, William Cox, Larry Lollis and Rick Thoennes were amalgamated with one another for the purposes of Plaintiffs' claims

The trial court's ruling amalgamating Marick, IMK, IKD, Williams Cox, Larry Lollis and

Rick Thoennes for purposes of liability was erroneous, unsupported and created a multitude of problems involving the jury charges (or lack thereof), the verdict form and both judgments entered by the trial court. This confusion resulted in an ambiguous verdict unsupported by the evidence at trial.[1]

Under South Carolina law, amalgamated corporations share liability if the court finds an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities. Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 358, 725 S.E.2d 112, 118 (Ct. App. 2012), rch'g denied (Apr. 20, 2012). South Carolina courts have looked at the following aspects of corporate formalities to determine whether an amalgamation between corporations exists: offices, letterhead, owners, oversight, contact information and board members. Id.; See also: Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986). In Pope v. Heritage Communities, 305 S.C. 404 (2011), the Court of Appeals found that three corporations were amalgamated due to shared location, telephone number, board members and vague delineation of employees. This case involved a suit by a property owners' association developer/seller HCI and the general contractor BuildStar. Id. at 410.

In this same vein, the trial court failed to charge the jury pursuant to S.C. Code Ann. §33-44-5303 which provides: "the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." A director, officer, or

[1] To the extent the trial court relied upon the legal theories of piercing the corporate veil and/or alter-ego theory, Plaintiffs' counsel conceded at trial that piercing the corporate veil and/or alter-ego theory are not applicable in this case. See R.p. 1548, line 15-R.p. 1549, line 21.

agent is not liable for the violations of duty of a corporation or of other officers or agents merely because of his office. He is liable only for such breaches of duty in which he has participated or which he authorized or directed. BPS, Inc. v. Worthy, 362. S.C. 319, 328, 608 S.E.2d 155, 160 (Ct. App. 2005).

South Carolina has no cases which amalgamated a corporation with an individual. The trial court improperly created new law in ruling that the individuals were amalgamated with the corporate entities.

The trial court further erred in failing to perform the proper analysis involved in the amalgamation of interest theory during Marick's Motion for Directed Verdict:

> "MR. IMHOFF: Your Honor, have you done the analysis between Marick and the individual owners of Marick that these individuals were so amalgamated with Marick that there was a blurring of the distinction between the individuals and the corporation? Because I think it needs to be done twice here.
> THE COURT: Well, I think I've done enough to -- what is it? -- see that there was a certain mixture of the two corporate groups by reason of their individual members."

See R.p. 1554, lines 16-25.

The trial court also found:

> "I find that there is a little too much self-dealing, if you would, please, in this that needs to be sorted out. And I think the jury would be the better group to do that. So I'm going to deny your motion."

Id. At R.p. 1554, lines 12-15.

No evidence was submitted on the elements of amalgamation of interests at the trial. No evidence was provided that IMK and Marick shared phone numbers, offices, letterhead, employees or board members so as to avoid corporate formalities. Marick's members were Rick Thoennes and his son, Rick Thoennes, III. See R.p. 1356, lines 17-23. Marick and Integrys Keowee operated

within the IMK umbrella. Marick was to provide the construction at its cost and Integrys Keowee provided the investment with Marick and Integrys Keowee to split the profits. See R.p. 1325, line 14-R.p. 1326, line 1. Marick would submit bills to IMK for hard costs associated with the Stoneledge project and IMK would issue a check payable to Marick for those hard costs. See R.p. 1359, line 23-R.p. 1361, l ine 17. Larry Lollis testified that he was not familiar with the day to day operation of IMK and was only a passive investor. See R.p. 1306, line 21-R.p. 1307, line 9. Lollis was not affiliated corporately with Marick. See R.p. 1308, lines 20-23.

Robert White, a unit owner at Stoneledge, testified that he purchased the unit from IMK and was aware that IMK was the developer. See R.p. 1261, lines 5-14. Mr. White testified that Nathan Hornaday was employed by Marick and that Mr. Hornaday performs punch list work for Marick. See R.p. 1263, lines 13-21.

The trial court failed to conduct any analysis involving the elements of amalgamation of interests under established South Carolina law. Additionally, the trial court ignored precedence by amalgamating individuals with corporations. Plaintiff's counsel stipulated that he did not allege or prove piercing the corporate veil or alter ego leaving amalgamation of interests as Plaintiff's sole theory for blending Marick, IMK, IKD, Williams Cox, Larry Lollis and Rick Thoennes together for purposes of determining liability. The trial court's errors were prejudicial to Marick and caused mass confusion regarding the jury charges, verdict form, apportionment and subsequent orders.

VI. The lower court erred in denying Marick's Motion for Partial Directed Verdict regarding the lack of proximate cause of Plaintiffs' Damages

Marick could not be liable for construction defects emanating from work it did not perform. Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could

have been avoided. McKnight v. S. Carolina Dept. of Corrections, 684 S.E.2d 566 (S.C. App. 2009). Proximate cause is an essential element common to alternative theories of negligence and breach of implied warranty. Small v. Pioneer Mach., Inc., 494 S.E.2d 835, 842 (S.C. App. 1997).

A subsequent builder/developer that takes over a project may only be held liable for any damages proximately caused by the alleged negligent repair, but not for any original damages proximately cause by the negligence of the initial builder, architect or contractor. Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984). One who undertakes to make repairs to defective components of a construction project is not liable for the negligent builder or contractor. Id. The liability of a subsequent builder/developer is expressly limited to the repairs the subsequent builder/lender actually performed. Regions Bank v. Coll. Ave. Dev.,LLC, CIVA8:091095-RBHBHH, 2010 WL 985298 (D.S.C. Jan. 22, 2010) report and recommendation adopted as modified sub nom. Regions Bank v. Coll. Ave. Dev, LLC, CIV .A809CV01095RBH, 2010 WL 973480 (D.S.C. Mar. 10, 2010).

There was limited evidence that any repairs made by Marick were defective and proximately caused damages. There was no evidence Marick constructed the original exteriors. Defendant Bostic was the original general contractor on Phase I of the Stoneledge Project who built and got permits for all units. See R.p. 1080, line 11-R.p. 1081, line 15. The exteriors of the buildings were constructed before Marick came on the Stoneledge Project. Id.; See also R.p. 1363, lines 8-18. Derek Hodgin testified that a general contractor who undertakes to make a repair is responsible for an inadequate repair; however, Mr. Hodgin offered no testimony that a general contractor is responsible for defective construction work performed by a previous general contractor. See R.p. 906, line 18-R.p. 907, line 6. Hodgin did not provide evidence, and in fact

was unaware, of the repairs performed by Marick on Phase I of the project. See R.p. 1106, line 20-R.p. 1109, line 25.

The testimony from Hodgin was that the repair scope from the time Marick came on the project in 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. Id. at R.p. 987, lines 4-21. Hodgin testified to the following regarding the scope of repair being essentially the same:

> 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 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.

Marick's partial Motion for Directed Verdict based upon lack of proximate cause should be granted based upon the testimony and evidence presented at trial. The standard established through Plaintiff's own expert is Marick is not responsible for the negligent construction performed by Bostic. The testimony is clear that the scope of repair to address Bostic's defective work would be the same today as it would have been in 2005 when Marick arrived at the Stoneledge project except for potential damage to O.S.B. sheathing and framing. Accordingly, the verdict against Marick for negligent construction should be limited to the repair estimate to repair the O.S.B. sheathing and framing.

VII. The trial court erred in failing to instruct the Plaintiffs to elect a remedy from the verdicts awarded under separate causes of action awarding damages for the same

facts and circumstances, and further erred in entering a judgment which did not correlate with the jury's verdict.

The trial court erred by failing to require that Plaintiffs elect a remedy based upon the jury's findings and award. All of the damages awarded to the Plaintiffs by the jury arise from the same set of facts and are not distinct to different causes of action.

Within the verdict form submitted to the jury, included were questions to the jury seeking to determine if in fact the jury found that the Appellants were liable to the Respondents under the following causes of action: (1) Breach of Warranty; (2) Negligence; and (3) Breach of Fiduciary Duty. The jury ultimately found in favor of the Plaintiffs as to each cause of action. The jury then attributed an amount of damages awarded pursuant to each separate cause of action. In the verdict form, the apportionment form and otherwise, the trial court failed to provide appropriate direction to the jury or any safeguard to ensure that the damages awarded for negligence, breach of implied warranty of workmanlike service and breach of fiduciary duty did not result in a double/triple recovery of the same damages by Plaintiffs.

"Election of remedies involves a choice between two or more different and coexisting modes of procedure or forms of relief afforded by law for the same injury." Harper v. Ethridge, 290 S.C. 112, 120, 348 S.E.2d 374, 379 (Ct. App. 1986). "Stated another way, '[e]lection of remedies is the act of choosing between different remedies allowed by law *on the same state of facts.*'" Id.

"[T]he basic purpose of election of remedies is to prevent double recovery for a single wrong, application of the doctrine should normally be confined to cases where double compensation of the plaintiff is threatened." Harper v. Ethridge, 290 S.C. at 121.

> In many instances, this means the case can go to the jury on all causes of action supported by the evidence at trial, with election required after verdict but before judgment is entered. *See, e.g., Nichols v. State Farm Mutual Automobile Insurance*

> *Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983) (circuit judge allowed case to go to jury on two causes of action but after verdict entered judgment on only one cause of action to prevent double recovery). When the facts entitle a party to alternative remedies, those remedies are not considered inconsistent, and he may plead and prove his entitlement to both. [Citation omitted] As we have previously observed, [t]his rule rests on the principle that the plaintiff should have a full opportunity to prove his claim to some form of relief, but he should not receive a double recovery.
>
> Id.

"When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both." Williams v. Riedman, 339 S.C. 251, 275 (Ct. App. 2000). In the case at bar, the verdict form and trial court's interpretation of the jury's finding leads to a double recovery. As such, the Plaintiffs must be required to select a single remedy.

It is clear from the jury's verdict that the actual damages that could be awarded against Marick by the jury and against Bostic by the jury, as a matter of law and upon all of the evidence, were the very same actual damages awarded against Marick and Bostic on the breach of implied warranty of workmanlike services cause of action. As a result, the case should be remanded back to the trial court and the Plaintiffs should elect their remedy and the trial court should then enter a judgment on the elected cause of action only. Additionally, the actual damages awarded to Plaintiffs against Marick under the breach of fiduciary duty cause of action are the very same actual damages awarded under the negligence and implied warranty causes of action. Plaintiffs' counsel, in closing argument, admitted that all of the damages requested were exactly the same under each cause of action claimed. (R.p. 1871, lines 8-10).

In determining that the Plaintiffs were entitled to a cumulative judgement as to the actual damages awarded under each of the three causes of action, the trial court and the Plaintiffs relied upon the case of Keeter v. Alpine Towers Inter, Inc., 399 S.C. 179, 730 S.E.2d 890 (Ct. App. 2012). In Keeter, the plaintiff set forth three causes of action and each cause of action was

submitted to the jury in the verdict form and included a blank for a damages amount to be written on each cause of action. Id. The jury awarded damages to the Plaintiff in Keeter under each cause of action pled. As a result, once the verdict was returned, the trial judge questioned the jury regarding the verdict and the jury indicated that the damages awarded were to be cumulative. No such discussion with the jury occurred in the case at bar.

The jury awarded damages in the following particulars: (1) negligent construction - $3,000,000.00; (2); breach of implied warranty of workmanlike service: $1,000,000.00; and (3) breach of fiduciary duty: $1,000,000.00. It is undisputed that all of the damages awarded are the same and arise from the same set of facts. When the jury awarded damages of $3,000,000.00 under the negligence cause of action, the jury further apportioned liability for each as follows: 60% - Bostic; and 40%-Marick. With regard to Plaintiffs' cause of action for breach of implied warranty, as a matter of law and evidence, the jury could not award actual damages that were different for the same construction defects and damages. The law behind breach of implied warranty leads to damages that are the same or similar to that of damages awarded as a result of negligent construction: "A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 344 (1989). While the jury elected to award only a fraction ($1 Million) of the actual damages it awarded on the negligence cause of action, that does not change the fact that the actual damages awarded on the breach of warranty claim are indisputably duplicative of actual damages awarded on the negligence claim.

It further should be noted that the evidence is clear that Marick was only involved with performing minimal repairs to the properties, and that the repairs suggested by the Plaintiffs' experts were repairs that would have been required whether or not Marick came to the property or

not due to Bostic's original construction work. The testimony from Derek Hodgin was that the repair scope from the time Marick came on the project in 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. Id. at R.p. 987, lines 4-21. Hodgin testified to the following regarding the scope of repair being essentially the same:

> 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.

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

John Folk prepared an estimate of repair 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 to repair. See R.p. 1207, lines 14-21. That damage is the only damage which Hodgin attributed to repair work and not original construction.

Further, the jury's inexplicable apportionment of liability for damages on the implied warranty claim, among the same two builders and on the identical set of facts and evidence presented with regard to the negligence claim, can logically mean only one of two things: the jury entered its verdict in complete disregard of the applicable law and/or the evidence, or the jury did not understand the applicable law so as to enable it to enter a valid and legal verdict. Under the exact same evidence as to each claim (which builder constructed or repaired what work, resulting in which damages), and considering that each builder could only be legally responsible for damages its actions or omissions caused (whether under a theory of negligence or breach of warranty), it is not possible to find Bostic to be responsible for 60% of the damages under the negligence claim but only 30% of the same damages under the implied warranty claim (jury verdict

apportionment under breach of warranty claim was 70% to Marick and 30% to Bostic). Nor is it possible to find Marick responsible for 40% of the damages under the negligence claim but 70% of the same damages under the implied warranty claim. Frankly, it would appear that the court has no option but to throw out the verdict on breach of implied warranty even if election remedies was not required in order to avoid double recovery of Plaintiffs' actual damages.

As it concerns the $1,000,000.00 in actual damages awarded by the jury on the breach of fiduciary duty claim, said damages are also undoubtedly the same actual damages awarded by the jury on the negligence cause of action. When addressing a developer's fiduciary duty owed to the homeowners and HOA in a development, courts have held that the developer's failure to turn over the common areas in good repair at the time they are conveyed to the HOA, or to ensure that the HOA had sufficient funds to maintain the common areas, subjected the developer to liability. See Goddard v. Fairways Dev. Gen. Partn., 310 S.C. 408, 414 (Ct. App. 1993). However, as noted in the breach of fiduciary section of this Brief, "any liability imposed upon the developer is limited to the costs that would have been required [at the time the common areas were conveyed to the HOA] to bring the common areas up to standard." Id. at 415-416. Further, the standard for damages awarded under a breach of fiduciary duty claim is the "cost of repairs." Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp., 349 S.C. 251, 256, 562 S.E.2d 633, 636 (2002). Based upon the law applied by the trial court concerning the liability at issue in a breach of fiduciary duty context, it is perfectly clear that the actual damages flowing from the fiduciary responsibility are exactly the same as the actual damages associated with the negligence claim and breach of warranty claim; monies to repair the buildings. The damages awarded by the jury either do not follow the law and further are duplicative and lead to Plaintiffs receiving a double recovery.

VIII. The court erred in entering the judgment and applying setoff.

Over a year after the verdict/judgment was entered in this case, the Court granted a post-trial motion and amended the judgments entered against each party. On November 8, 2013, a judgment was entered by the trial court, which was based in whole or in part upon the verdict returned by the jury on the Verdict Form and the Apportionment Form. (R.p. 24-25; R.p. 26-35). The November 8, 2013 Judgment entered by the trial court provided as follows: IMK - $1,150,000.00; Larry Lollis - $200,000.00; William Cox - $200,000.00; Rick Thoennes - $200,000.00; Integrys - $200,000.00; Marick - $950,000.00; and Bostic - $2,100,000.00.

After numerous post-trial motions and memoranda in support thereof were presented to the trial court over the course of more than one year, the trial court altered/amended the judgment entered against each party. On January 30, 2015, the trial court filed an amended order which provided as follows: (1) negligence: (a) Bostic - $2,144,088.23; (b) Marick & IMK: $857,635.29; (2) Breach of Warranty: (a) Bostic: $643,226.47; Marick: $2,144,088.23; (3) Breach of Fiduciary Duty: (a) IMK: $2,144,088.23; (b) Integrys: $2,144,088.23; (c) Rick Thoennes: $2,144,088.23; William Cox: $2,144,088.23; and Larry Lollis: $2,144,088.23. (R.p. 36-38).

The damages awarded and apportionment provided do not correlate with the evidence presented as Plaintiffs own witnesses, including their retained expert, Mr. Hodgin, testified that the vast majority of the construction defects at issue, and the damages flowing from such defects, arose out of work performed by Bostic and its subcontractors, not from the work of Marick. As noted above, John Folk prepared an estimate of repair 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 to repair. See R.p. 1207, lines 14-21. That damage is the only damage which Hodgin attributed to repair work and not original construction. Thus, awarding the amount of

damages awarded against Marick and IMK for the construction defects at the property does not correlate with the weight of the evidence presented.

First and foremost, the verdict rendered was in error because the verdict and apportionment forms submitted to the jury were deficient. The forms, which together instructed the jury to apportion liability for the actual damages resulting to the Plaintiffs as a result of negligence based on a percentage of negligence attributable to each defendant, were erroneous. The jury should have been instructed to determine the separate and distinct damages arising from negligent construction by Bostic and its subcontractors and the separate and distinct damages arising from negligent repairs of Marick, if any. The same can be said for the verdict and apportionment forms for the breach of warranty cause of action.

The apportionment errors in the jury's findings in the apportionment form, in the November 8, 2013 Judgment, (R.p. 24-R.p. 25) and repeated in the January 30, 2015 Judgment must be corrected or the Defendants should be afforded a new trial. (R.p. 36-R.p. 38)

Secondly, the trial court must set off in the amount of the settlements received by Plaintiffs from other culpable parties as against the judgment entered against each of the Defendants. Based upon information supplied to the Court by the Plaintiffs, Plaintiffs received $2,855,911.77 from settlements with other culpable parties. Defendants moved for the trial court to apply that set off to the original judgment (R.p. 1741) entered against Marick and Thoennes. Defendants believe that consideration of the set off argument, in addition to the election of remedy argument, gave rise to the lower court's Order dated January 30, 2015 changing the judgment amounts. (R.p. 36-R.p. 38). This has led to the erroneous cumulative verdict which was not the intent of the jury.

Lastly, and most importantly, the trial court's January 30, 2015 Order altering and amending the judgment entered in this case, was improper and is completely contrary to the

evidence presented at trial, the applicable law, and the Verdict Form presented to the jury. Under section 3 of the Verdict Form, the Court submitted the question of liability for breach of fiduciary duty to the jury separately for IMK, IKD, Thoennes, Cox & Lollis. The jury verdict form indicates that the jury set the actual damages resulting to the Plaintiffs as a result of the breach of fiduciary duty cause of action at $1 Million. This represents the maximum sum that the jury allowed for recovery pursuant to the Plaintiffs' breach of fiduciary duty cause of action. No other claims against the individual Defendants including Thoennes were considered.

Once applied, the Defendants moved the trial court for application of set off in the amount of the settlements received by Plaintiffs from other parties ($2,855,911.77). Defendants requested set offs in the amount of $2,855,911.77 for Marick and Thoennes.

In response, Plaintiffs' counsel argued, by way of correspondence to the trial court dated November 25, 2013 that "in conformance with the Court of Appeals' decision in Keeter v. Alpine Towers, the full amount of the cumulative jury award, $5 Million, be assigned to each of the three causes of action (negligence, breach of warranty, and breach of fiduciary duty). After making said argument, the correspondence went on to provide that applying the apportionment act to the 'cumulative judgment" would result in the following judgments after set-off was applied (for breach of fiduciary duty as Thoennes): Thoennes: $2,144,088.23.[2]

No colloquy was made between the counsel and the trial court as to the cumulative nature of the verdict, nor was there inquiry made of the jury as to its intent. Defendants dispute that there was ever a discussion concerning the verdict being cumulative. Defendants do not believe this exchange occurred or that it occurred in such a way as to have properly given Defendant an opportunity to object or argue the matter after the verdict was rendered or the trial court made the

[2] The same amount of damages was attributed to each individual defendant and IMK and IK.

alleged ruling. Even if the exchange had occurred, said ruling is for the jury, and not the court, and can only be cumulative when the claims at issue are against the same Defendants. Without commonality of claims and defendants, making the recovery cumulative calls for speculation as to the authority provided by the jury, which limited the Plaintiffs to certain awards under each cause of action pled.

In Keeter v. Alpine Towers Int'l, Inc., which was the sole authority relied on by Plaintiffs' counsel in support of the universal cumulative verdict with set-off, Plaintiff brought an action against Alpine, for strict liability, negligent design, and negligent training after Plaintiff was injured and deemed a paraplegic as a result of a fall. The jury returned a verdict for the Plaintiff on each cause of action against Alpine. The jury awarded damages as follows: strict liability - $500.00; negligent design actual damages - $900,000.00; negligent design punitive damages - $160,000.00; negligent training actual damages - $2,500,000.00; and punitive damages for negligent training - $950,000.00. Keeter v. Alpine Towers Int'l, Inc., 399 S.C. 184, 187 (Ct. App. 2012). Once the jury returned the verdicts, Plaintiff made a motion asking the court to inquire of the jury whether it meant for the damages awarded to be cumulative. While the jury was still in the courtroom, the judge asked the forelady and she responded that yes, it was to be cumulative. Id. at 200. The discussion between the judge and the forelady required a back and forth between the two to make a final determination of the jury's intent.

In the case at bar, there was no such colloquy. The trial court did not make such inquiry of the jury, and the jury did not decide such issue. As it stands, the trial court has invaded the province of the jury in two ways: (1) by ruling that the verdict is cumulative sua sponte without inquiring of the jury as to its intent; and (2) by re-writing the verdict and imposing a new and different damages amount over and above the amounts awarded for each individual cause of action.

No evidence was ever presented in this case to persuade that the jury intended that the damages amounts written in the three blanks by the jury were to be added together for a total amount, unlike the jury intent as evidenced in Keeter. As noted further in Allegro, Inc. v. Scully, 409 S.C. 392, 405, 762 S.E.2d 54, 61 (Ct. App. 2014), reh'g denied (Aug. 26, 2014), cert. granted (Apr. 22, 2015), the court determined the intent of the jury's award by questioning the jury before and after the verdict was rendered. No interaction occurred between the court and the jury in the case at bar to determine the intent of the jury.

"It is not fair for the trial court to say what it thinks the verdict should be." Camden v. Hilton, 360 S.C. 164, 173 (Ct. App. 2004). A jury's verdict should be upheld when possible to do so and to carry into effect what was clearly the jury's intentions. Id. The trial court in this case decided to change the jury's award to what it thought the award should have been. It made this determination while using no guidance from that of the fact finder, the jury. This is a complete violation of the jury system that is so great in this country which affords ones peers to resolve disputes and not one appointed trier of fact. If this court upholds the trial court's willful violation of the jury's role, it will leave the court system in South Carolina with less credibility and honor to the citizens that rely upon it to resolve disputes.

This issue should be remanded to the lower court with one of the following to occur: (1) the court requires the Plaintiffs to elect its remedy and choose one of the awards rendered by the jury; or (2) require a new trial.

IX. The trial court erred by failing to properly charge the law associated with a breach of fiduciary duty action and the business judgment rule.

No evidence or expert witness testimony was presented to the jury to establish a standard of care upon which a breach of fiduciary duty could be asserted. Over the objections of Defendants, the Court charged the jury to the effect that a developer of a planned unit development

owes a fiduciary duty to the property owners' association to turn over common areas that are in good repair or to provide the association with funds sufficient to effectuate any needed repairs without further explanation. The charge given by the Court is not an accurate statement of the law of South Carolina, and it incorrectly expresses and implies that such a duty by a developer is akin to strict liability for defects, whether latent or patent. This was a critical issue in the trial as there was no evidence that Thoennes or the other members of the HOA Board, had any knowledge of unrepaired defects at the Project at the time control of the HOA Board was transferred to the homeowners in 2007. Rather, the evidence was that any defects then existing were latent, unknown and/or repaired when identified.

The jury should have been charged with the following accurate statement of the law, as requested by the Defendants: "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." Goddard v. Fairways Dev. Gen. Partn., 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993). "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." Baumann v. Long Cove Club Owners Ass'n, Inc., 380 S.C. 131, 138, 668 S.E.2d 420, 424 (Ct. App. 2008).

It is true that certain South Carolina cases have recognized a fiduciary duty on the part of a developer of a planned unit development (PUD) "to insure that the common areas are in good repair at the time they are conveyed to the property owners association or to provide the association with funds sufficient to effectuate any needed repairs to those areas." Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp., 349 S.C. 251, 256-57, 562 S.E.2d 633, 636-37 (2002);

see also Goddard, 310 S.C. at 414, 426 S.E.2d at 832; Magnolia North Prop. Owners' Ass'n, 397 S.C. at 374-75, 725 S.E.2d at 126-27. However, each of these opinions makes it clear that the quoted statement is not a complete and accurate statement of the law. There is no indication that these cases are intended to establish what amounts to a strict liability standard for defects, both known and unknown, at the time control of the HOA is transferred from the development to the homeowners. Importantly, each of these cases was decided in the context of patent defects only, of which the developer was aware but did not repair or provide funds for repair. The quoted holding must be read in this context, and any charge to the jury should have made clear that the developer's duty did not include the repair of (or the provision of funds to repair) defects which were latent at the time control of the HOA was transferred to the homeowners.

In Goddard, the complaint was not construction defects but the developer's known failure to perform routine maintenance and repair of the common areas. The court recognized that the substandard nature of the common areas was known to the developer at the time it turned the common areas over to the HOA. "While the evidence shows the Developer provided some maintenance of the common areas at its own expense until it belatedly organized the Association, there is evidence that the common areas were substandard at the time the Developer turned them over to the Association. There is also some evidence the Developer seized the opportunity in 1987 to 'unload' the common areas on the Association without a plan to establish a reserve or a plan to fund the Association until such time as assessments were adequate to cover maintenance expenses. It seems unfair to the villa owners for the Developer to burden them with substandard or deteriorated common areas that required an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures." Goddard, 310 S.C. at 415, 426 S.E.2d at 832. The facts of this case do not correlate with the facts of Goddard, as is noted

herein, when repairs were requested by the homeowners, those repairs were performed and further, when the HOA was transferred to the HOA, there was in excess of $70,000.00 in the account.

In Concerned Dunes West Residents, the court recognized that, before the developer executed a deed conveying the roads and other common areas within the development to the POA, the developer, "learned that significant additional road and drainage repairs were needed within the development." Concerned Dunes West Residents, 349 S.C. at 255, 562 S.E.2d at 635. In citing and relying upon Goddard, the Supreme Court specifically cited the Goddard facts of patent defects quoted above.

In Magnolia North Prop. Owners' Ass'n, the court acknowledged that the subject defects were patent, not latent, at the time control was turned over to the POA. "Here, until the turnover, Appellants [developer] assured the unit owners the construction defects would be repaired, and, as a result, the owners were justified in relying on those assurances." Magnolia North Prop. Owners' Ass'n, 397 S.C. at 373, 725 S.E.2d at 126 (in context of affirming trial court's ruling that defendants were equitably estopped from asserting defense of statute of limitations). In this case, no evidence was ever presented that any repairs to patent defects were needed when the HOA was transferred to the homeowners.

The facts presented by HOA representative Steve Taylor, were that when Bostic left, Marick came in and saved this development. R.p. 539-R.p. 541. Further, Taylor testified that while Marick/Thoennes were onsite from 2005-2008, Taylor was not aware of any of the following: (1) defects to deck columns; (2) roofing defects; (3) that all foundations were leaking; (4) believed that the siding "wasn't right" but never made any complaint/comment to Marick, Thoennes or the HOA regarding his opinions of the siding; and (5) was not aware of problems with the stonework, or windows at the project. R.p. 548-R.p. 549.

The testimony from Steve Taylor further provides that during the time that Thoennes and others were in charge of the HOA, Marick was onsite and providing repairs as requested by the homeowners.

Q: Did Marick have someone that would respond to repair requests?
A: Yeah. There was a gentleman by the name of Nathan who was on site.
Q: And they also had an email address and phone numbers, didn't they?
A: Yeah.
Q: Okay. So if you're a homeowner between 2005 and 2008 at Stoneledge, you could call or you could email or you could grab Nathan, you could grab Rick?
A: Yeah.

(R.p. 549, lines 15-25)

Mr. Taylor went on to admit that he did not complain of the HOA or Marick from 2005-2008, as Marick had representatives available throughout to assist the homeowners with complaints. R.p. 550, lines 17-25. Mr. Taylor testified that Marick and Thoennes helped make Stoneledge "an attractive community" and further, when turning the HOA over the homeowners, left the HOA with approximately $70,000.00 to $100,000.00. R.p. 553, line 22-R.p-. 555. Mr. Taylor ultimately admitted that Mr. Thoennes was honest and had done a good job handling the HOA. R.p. 556, lines 1-5. Mr. Taylor did not say that Thoennes and the other members of the HOA turned the HOA over to the homeowners while ongoing problems or defects existed. If that had occurred, certainly Mr. Taylor would have testified to the same and certainly the Plaintiffs would have presented documentation of the homeowners' objections. That is why this case differs from the cases cited above, as there was no evidence that the HOA members including Thoennes, when the HOA was transferred to the homeowners, were aware of patent defects that were left unrepaired (the business judgment rule applies). Further, even if there were patent defects, which there is no evidence of, Thoennes and the HOA left the homeowners between $70,000.00-$100,000.00 in the HOA's account.

Marick's representative Nathan Hornaday testified that if a repair was requested, he does not recall Mr. Thoennes ever refusing to make the repair. R.p. 712, lines 10-12. Mr. Thoennes' testimony reveals the same:

> Q: And when the homeowners, Mr. Taylor and everybody else, would come to you, did you repair their units or instead of making repair to their units, hire someone to repair their units?
>
> A: Yes. I can only think of a rare instance where we didn't, and that would have been some kind of cosmetic thing inside the unit that we probably would not have tackled. But even inside, we did warranty work. We fixed doors and sump pumps and those kinds of things. It was more the cosmetic stuff that we didn't feel like we should fix.

R.p. 1390, lines 3-13.

Further, individual Defendant William Cox testified that when repairs were identified they were performed and that he was unaware of any construction defects when property was sold. (R.p. 1348-R.p. 1349)

The testimony from the homeowners indicated that the homeowners believed the common areas were transferred from the developer to the HOA in good repair, and that Marick/Thoennes were responsive to the issues that were reported by the unit owners. It is clear that by failing to charge the proper standard for breach of fiduciary duty, and by failing to charge the business judgment rule, the Jury had no idea what this cause of action encompassed. No reasonable juror would have found, based upon the proper legal standard for breach of fiduciary duty, that the HOA members were in anyway liable for the latent defects identified at the property after the property was turned over to the homeowners.

CONCLUSION

The trial court committed a multitude of errors listed herein. For the reasons stated herein, the trial court's rulings on Marick's motions for summary judgment, motions for directed verdict and proposed jury charges regarding proximate cause, negligence, implied warranty of

workmanlike service, implied warranty of habitability, amalgamation of interests and breach of fiduciary duty should be reversed to conform with the evidence. The trial court further committed error if failing to direct Plaintiff to elect its remedy and failed to apply the proper set off. The trial court's rulings regarding election of remedies and set off should be reversed. Alternatively, Marick's motion for new trial absolute or motion for new trial nisi remittitur should be granted due to the trial court's errors listed herein.

Jason M. Imhoff (S.C. Bar #: 69355)
C. Reed Teague (SC Bar #: 79933)
Chad M. Graham (SC Bar #: 11569)
The Ward Law Firm, P.A.
P.O. Box 5663
Spartanburg, SC 29304
Telephone (864) 582-3075
Facsimile (864) 585-3090
Attorneys for Appellants

July 22, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUL 29 2016
SC 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,

Certificate of Counsel

The undersigned hereby certify that the Appellants' Final Brief complies with Rule 211(b), SCACR

Jason M. Imhoff (SC Bar #: 69355
The Ward Law Firm, PA
PO Box 5663
Spartanburg, SC 29304
(864) 582-3075
(864) 585-3090
jimhoff@wardfirm.com
rteague@wardfirm.com

Attorneys for Appellants Marick Home Builders, LLC and Rick Thoennes

July 22, 2016

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 Final Brief 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 July 26, 2016, addressed to Respondents' attorneys of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, PO Box 773, Charleston, SC 2940.

Amanda D. Steward
Paralegal to Jason M. Imhoff

July 26, 2016

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 THE OCONEE COUNTY

Court of Common Pleas

The Honorable Alexander S. Macaulay

Appellate Case No. 2015-000392

Stoneledge at Lake Keowee Owner's 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 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 Marinez-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 WHOM MARICK HOME BUILDERS, LLC AND RICK THOENNES ARE THE.....APPELLANTS

FINAL BRIEF OF RESPONDENT

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
P. O. Box 773
Charleston, SC 29401
Attorney for Respondents

TABLE OF CONTENTS

Cases

Statutes

STATEMENT OF THE ISSUES

1. Is there evidence to support the trial court's denial of Marick's Motion for Directed Verdict on Plaintiff's claim for Breach of the Implied Warranty of Workmanlike Service?
2. Were any of the trial court's charges or failures to charge erroneous or prejudicial and did Marick preserve those arguments for appeal?
3. Was the court's sustaining of an objection during closing erroneous and harmful and was it preserved for appeal?
4. Did the court properly deny Marick's Motion for Directed Verdict on the basis that proximate cause is a question of fact for the jury?
5. Did the court properly conclude that election of remedy was not required since the Plaintiff sought only one remedy?
6. Did the court correctly decide the issue of whether the verdict was cumulative and was that issue preserved for appeal?
7. Did the court correctly instruct the jury and apply the law relative to Plaintiff's breach of fiduciary claim?

STATEMENT OF THE CASE

Plaintiff Stoneledge at Lake Keowee Owners' Association, Inc. (HOA) instituted this construction defect lawsuit on May 29, 2009. The defendants were the developers, contractors, including Appellant Marick Builders and Rick Theonnes, and subcontractors responsible for the development, construction and sale of the units at Stoneledge and also the management of the HOA Board of Directors until September, 2008, when control was turned over to the owners.

On August 28, 2013, Judge Macaulay, upon the motion of certain subcontractor defendants, issued an Order for Separate Trials and Scheduling Order, which contemplated separate trials for Phase I and Phase II of the Project. (R. pp. 00001-00010). The basis of that order was that certain subcontractors were not involved in Phase 2, that different codes and even different law applied to the two phases, and that separate trials would prevent undue prejudice to certain subcontractors who performed work solely on one phase or the other. The Bifurcation Order set a Phase I trial to begin on October 28, 2013, and scheduled a Phase II trial to begin within a few months. (*Id.*)

The trial relating to the HOA's claims for Phase I began on October 28, 2013, and resulted in a jury verdict against Bostic Brothers in the amount of $5,000,000. The trial judge determined the verdict was cumulative, and the jury was dismissed without objection. On November 8, 2013, the Court entered a Form 4 Order of Judgment. (R. p. 00024-00027). Bostic Brothers filed post-trial motions including a Motion for Judgment Notwithstanding the Verdict, a Motion requesting an Order granting a set-off, a Motion for a New Trial Absolute, pursuant to Rule 59, SCRCP, and a Motion for a New Trial Nisi Remittitur, also pursuant to Rule 59.

Plaintiff filed a Motion to Alter or Amend Judgment seeking to have the full amount of the cumulative judgment award, $5,000,000, assigned to each of the causes of action. (R. pp. 00116-00141; R. pp. 00224-02331; Plaintiff's Motion[1]). By letter dated November 25, 2013, Plaintiff clarified the prior settlement amounts ($2,855,911.77) received from defendants for Phase I and asked that the full set-off be applied to each cause of action, reducing the amount awarded for each cause of action to $2,144,088.23. (Letter to Judge Macaulay from Lyles dated November 25, 2013). No defendants objected to the amount of prior Phase I settlements as set forth in the letter.

Judge Macaulay presided over a hearing on all post-trial motions on April 10, 2014. (R. pp. 00106-00216). Defendants' motions were not ruled on until January 22, 2015, at which point they were denied. (R. pp. 00018-00021).

As requested in Plaintiff's Motion to Alter or Amend and letter dated November 25, 2013, the trial court entered a Form 4 Judgment filed January 30, 2015, amending its prior Form 4 Judgment filed November 8, 2013, and applying a set-off for the amounts recovered by the Plaintiff from the settling defendants. (R. pp. 00036-00038).

STATEMENT OF THE FACTS

This construction defect case arises from pervasive defects and resulting damage at an 80-unit townhome project on Lake Keowee in Oconee County ("Stoneledge" or the "Project"). The HOA is responsible for maintenance, repair and replacement of the building envelopes, roofs, porches and decks of the Stoneledge. (R. p. 00435, lines 6-11).

[1] The Record on Appeal does not contain the Plaintiff's Motion or the Letter to Judge Macaulay dated November 25, 2013. The Respondent designated both in Respondent's Designation of Matter dated May 13, 2016. Respondent plans to file a Motion to Supplement the Record.

Phase I consists of eight (8) buildings representing thirty-seven (37) individual units. Bostic Brothers Construction, Inc. ("Bostic Brothers") served as the original general contractor and was also an owner of the development company, Keowee Townhomes, LLC. (R. p. 00850, lines 15-22). Bostic Brothers constructed and sold approximately 11 units and the remaining units were in various stages of completion when Bostic ceased construction and ultimately entered into bankruptcy. (R. p. 00632, lines 1-9; R. p. 00635, line 23-p.00636, line 2; R. p. 00683, line 12-p. 00684, line 11; R. p. 01365, line 12-20).

After Bostic left the project, on or about March 30, 2005 Keowee Townhomes, LLC sold the Project, including 25 unfinished units in Phase 1, to Defendant IMK Development, Co., LLC ("IMK"), a development company comprised of Defendants Marick Home Builders, LLC ("Marick") and Integrys Keowee Development, LLC ("IK"). (R. p. 01323, line 13-p.1324 line 17). Marick assumed the role of general contractor, obtained new building permits on 25 partially completed units, and began work on Phase I in 2005. (R. p. 00715, line 3-p. 00716, line 15; R. p. 01362, line 3-p.1363, line 7; R. pp. 02738-02759). Rick Thoennes was the managing member and license holder for Marick. (R. p. 01355, lines 23-25). Rick Thoennes assigned Nathan Hornaday as the Superintendent for the Project. (R. p. 00680, line 7-14; R. p. 00685, line 1-p. 00694, line 19).

Marick and Thoennes performed extensive work at the project to complete the build-out of Phase I. (R. p. 00714, line 25-p. 00722, line 20; R. pp. 02738-02759). To complete the units in Phase I, Marick was required to pull a number of building permits. (R. p. 00680, line 7-p. 00682, line 25; R. p. 00685, line 1-p.00694, line 19; R. pp. 02738-

02759). On the building permits, Marick represented the nature of the work it was going to undertake and assigned a value to that work. (R. p. 00680, line 7-p. 00682, line 25; R. p. 00714, line 24-p. 00722, line 20; R. pp. 02738-02759). The descriptions of the work ranged from completion of the interior of certain units to completion of other units "from the foundation up," and for various stages of work in between. (R. p 00714, line 24-p. 00722, line 20; R. pp.02738-02759). The value of the work to be performed pursuant to the permits, as estimated by Marick, was more than $1.4 Million. (R. pp. 0738-02759; R. p. 00714, line 24-p. 00722, line 20; R. p. 01363, line 19-p. 01364, line 11). To pull the permits, Marick had to certify that the work it was going to perform would comply with applicable building codes and ordinances. (R. p. 00714, line 24-p. 00722, line 20).

Through his company, Marick, Thoennes also performed a number of repairs to units in Phase I including re-waterproofing the concrete decks and balconies in response to owner complaints. (R. p. 00714, line 24-p.00722, line 20; R. p. 01367, lines 8-25). That work was in response to the complaints of early owners about problems and also because of Phase I units' deteriorated condition.

In addition to seeing the completion and sale of Phase I units, IMK created the HOA in 2005 and named Rick Thoennes, William Cox, and Tim Roberson as board members. (R. p. 00432, line 23-p.00438, line 1; R. p. 00519, line 1-p. 00521, line 1; R. p. 01326, line 2-10; R. pp. 02471; R. pp. 02472-02525; R. pp. 02526-02562; R. pp. 02568-02569). IMK remained in control of the board of the HOA until September 2008. (R. p. 01266, lines 3-5, R. p. 02471). At that time, control of the board was turned over to the owners who, collectively through the HOA, are the Plaintiffs in this action. (R. p. 02471).

Thoennes, a licensed general contractor and managing member of Marick, sat on the board of the association until September of 2008. Mr. Thoennes specifically testified that during the operative time, he was wearing a number of hats, including that of contractor, head of the sales department for IMK, and, to some degree, a member of the board. (R. p. 01385, line 21-p. 01386, line 17).

Plaintiff's expert Derek Hodgin provided expert testimony about the various construction defects at the Project. (R. p. 00859-01139; R. pp. 02901-03222). Hodgin developed a scope of repair for the defects and damages he discovered in Phase I (R. pp. 02901-03192), and Plaintiff presented evidence of the cost to repair totaling $6,309,197.00.

While they disputed the extent of the problems and the cost to repair, even the defendants admitted that the project suffered from severe and pervasive defects and required an extensive repair. Bostic Brothers' expert, Rick Moore, admitted that the Project had pervasive water infiltration, rot and deterioration resulting from the contractor's failure to properly construct the Project. (R. p. 01603, line 15-p. 01604, line 14; R. p. 01605, lines 3-7; R. p. 01659, lines 18-24; R. p. 01676, line 23-p. 01678, line 24). Bostic's expert Steve Watkins estimated a cost of $3,995,106.34 to implement Hodgin's scope of work (not including the cost for contract administration which Watkins agreed was necessary), and a cost of $2.47 million to implement the defendant's reduced scope of work. (R. p. 01237, lines 4-12; R. pp. 03225-03226; R. p. 01707, line 21-23; R. p. 01728, line 9-p. 01729, line 18; R. pp. 02437-02443). Marick did not offer expert testimony on any subject in the Phase I trial.

Before and during trial, all Phase I subcontractors settled with the HOA so when the Phase I verdict was rendered, the only remaining Defendants were the contractors for Phase I (Bostic and Marick) and the developers of Phase I (IMK, IK, Cox, Lollis and Thoennes). On November 8, 2013, the jury returned a verdict in favor of the plaintiff in the amount of $5,000,000 on three causes of action: negligence, breach of warranty of service, and breach of fiduciary duty. (R. pp. 00029-00031). The jury allocated that verdict among the three causes of action and specifically awarded $3,000,000.00 for the negligence cause of action, $1,000,000.00 for the breach of warranty cause of service, and $1,000,000.00 for the breach of fiduciary duty cause of action. At the request of defendants, the Court allowed apportionment of the awards under the negligence and breach of warranty causes of action pursuant to the Apportionment Statute. After deliberating, the jury allocated sixty percent (60%) of the negligence award to Bostic and forty percent (40%) to Marick and allocated seventy percent (70%) of the breach of warranty award to Marick and thirty percent (30%) to Bostic. (R. p. 00028). No allocation of any kind was requested with respect to the breach of fiduciary duty award, nor would that have been appropriate.

After the jury rendered its verdict, but before the apportionment phase of the trial, and while the jury was still empanelled, counsel for the HOA asked the Court if the jury's award was cumulative. In response, with no objection or inquiry from counsel for any defendant, the Court ruled as follows:

> Well, the way the Defendants have been treating it, yes, it is cumulative because they've been treating them all as separate little things that they want – what is it ? – apportionment on this one and apportionment on that one.

(R. p. 01979, line 8-p. 01980, line 18; R. p. 00120, line 5-p. 00123, line 8). Again, no Defendant objected to that ruling or requested any inquiry of the jury on any issue. Instead, after the court's ruling that the verdict was cumulative, the defendants merely argued their positions with respect to apportionment. (*Id.*) Once the jury decided that issue, the jurors were released with the consent of the defendants. (R. p. 01979-01998).

On November 8, 2013, the Court entered a Form 4 order of judgment. (R. pp. 00024-00031). Plaintiff filed a Motion to Alter or Amend Judgment seeking to have the full amount of the cumulative judgment award, $5,000,000, assigned to each of the causes of action. By letter dated November 25, 2013, Plaintiff clarified the prior settlement amount received from settling defendants for Phase I, $2,855,911.77, and asked that the full set-off be applied to each cause of action, reducing the amount awarded for each cause of action to $2,144,088.23. (R. p. letter not part of record). No defendants objected to the amount of settlements received by Plaintiff for Phase I as set forth in the letter.

As requested in Plaintiff's Motion to Alter or Amend and letter dated November 25, 2013, the trial court entered a Form 4 Judgment filed January 30, 2015, amending its prior Form 4 Judgment filed November 8, 2013, and applying a set-off for the amounts Plaintiff recovered from settling defendants. (R. p. 0036-0038).

STANDARD OF REVIEW

JNOV

"A motion for a judgment notwithstanding the verdict (JNOV) is merely a renewal of the directed verdict motion." *Jamison v. Hilton*, 413 S.C. 133, 139, 775 S.E.2d 58, 61 (Ct. App. 2015). The trial court must deny a motion for a directed verdict

or JNOV if there is conflicting evidence or the evidence yields more than one reasonable inference or its inference is in doubt. *Id.* Neither the trial court nor the appellate court has the authority to weigh or resolve conflicts in the evidence. *Id.* This Court will reverse the trial court's ruling on a JNOV motion only "when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Law v. S. Carolina Dep't of Corr.*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006).

MOTION FOR NEW TRIAL

Exclusion of Evidence

Since the trial court has sound discretion in deciding whether to admit or exclude evidence, the trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision. *Sullivan v. Davis*, 317 S.C. 462, 465, 454 S.E.2d 907, 909 (Ct. App. 1995); *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 242, 616 S.E.2d 431, 435 (Ct. App. 2005).

A finding of abuse of discretion does not end the analysis, however, "because to 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. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008) (citations omitted). "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *Allegro, Inc. v. Scully*, 409 S.C. 392, 407, 762 S.E.2d 54, 62 (Ct. App. 2014), reh'g denied (Aug. 26, 2014), cert. granted (Apr. 22, 2015).

Jury Charge

To establish that the judge's refusal to give a requested charge deprived one of a fair trial, the refusal must have been both erroneous and prejudicial. *Fairchild v. S. Carolina Dep't of Transp.*, 385 S.C. 344, 351, 683 S.E.2d 818, 822 (Ct. App. 2009), aff'd, 398 S.C. 90, 727 S.E.2d 407 (2012). Jury instruction should be confined to the issues supported by the evidence. *Id.* When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues. *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). The trial court is not required to instruct the jury on a principle of law that is irrelevant to the case as proved. *Id.* Moreover, even if the trial court erred in failing to give a requested instruction, the requesting party also must show that the error was prejudicial to warrant reversal on appeal. *Id.* If the charge is reasonably free from error, isolated portions that may be misleading do not constitute reversible error. *Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000). To preserve an argument relating to a trial court's failure to make a requested charge, it is incumbent on the party seeking the charge to proffer it and make it part of the record, so that the appellate court can see the charge which was rejected. *See Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990) (stating the appellate court will not review the failure to give a requested jury charge where the request to charge does not appear on the record).

ARGUMENT

Marick argues throughout its brief that it was not the primary or first general contractor for the construction of Phase I and that its liability should be limited in some way as a result. It cites *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415

(1984) in support of that position, contending that it should not bear liability for Bostic's poor workmanship, which it essentially inherited. Marick's arguments here reflect a misunderstanding of the claim asserted against it.

Marick was not sued because Plaintiff wanted to impose Bostic's liability vicariously on Marick. The Plaintiff has also not contended that Marick is a warrantor of Bostic's work. Instead, and quite clearly, Marick was sued for its own negligence and breaches of warranty with respect to the significant work it did in Phase I of Stoneledge.

The facts of this case establish that Marick stepped into the project as a general contractor and undertook to complete the vast majority of the units before selling them, through Marick's own development company, IMK. Indeed, Mr. Thoennes, Marick's principal and license holder described himself as the chief sales force for IMK. In doing so, Marick did what it described in building permits as more than $1,400,000 worth of construction to complete the units and performed extensive repairs to Bostic's shoddy work. (R. pp. 02738-02759). The evidence also supports a finding that Marick knew of other problems at the project, caused by Bostic, and failed to investigate or correct those problems. (R. p. 00680, line 7-p. 00682, line 25; R. p. 00714, line 24-p. 00722, line 20).

As in most cases of this type, the Supreme Court's opinion in *Kennedy v Columbia Lumber*, 299 S.C 335, 384 S.E.2d 730 (S.C. 1989), is determinative of the issues raised by Marick. In that case, the Supreme Court discusses *Roundtree* and explains its significance. Specifically, the *Kennedy* court notes that in *Roundtree*, a lender that monitored construction to protect its loan interest was deemed not to be liable for the faults of the contractor. "The monitoring by the lender was not enough to impose a legal duty on it to prevent construction defects." *Id* at 733. For purposes of this case,

and contrary to Marick's argument, the *Kennedy* court went on to note that in *Roundtree*: "We agreed, however that a duty on the lender to use due care did arise regarding the repair work it undertook." *Id.* The Supreme Court in *Kennedy* goes on to describe that a builder not only warrants his work (the implied warranty of service) but that he is liable in negligence when he violates a legal duty, such as the building code, or deviates from industry standards.

Just as the lender in *Roundtree* could be sued for negligently performing repairs to the roofs at that project, Marick can be sued here for its role as one of the Phase I general contractors who performed original work and performed repair work. As the court noted in *Roundtree*, the liability of the lender for faulty repairs undertaken on its behalf was a jury question. Marick's liability as a contractor for the completion of Phase I and its liability for faulty repairs was also a question for the jury. Marick's negligence and breach of warranty for the work it performed combined with that of Bostic to cause one harm, for which the Plaintiff sought recovery. *See Atlantic Coast Line v Whetstone*, 243 S.C. 61, 132 S.E. 2d 172 (S.C. 1963) (stating an injured person can sue any one or all of several joint tort-feasors whose negligent acts or omissions unite to produce his injury and that negligence, to render a person liable need not be the sole cause of an injury; but it is sufficient if it is a proximate concurring cause).

Moreover, as noted throughout this brief, Marick had the advantage that the lender in *Roundtree* did not have in the form of the Apportionment Statute. Marick tried to get the jury to reduce the awards against it based upon what it contends was its smaller role in causing the Plaintiff harm. Thus, the arguments that Marick now makes were expressly considered and weighed by the jury, and Marick has suffered no harm by

submission of this case to the jury despite the fact that it was the second, not the first, contractor to cause harm to the Plaintiff.

I. THE TRIAL EVIDENCE SUPPORTS THE COURT'S DENIAL OF MARICK'S MOTION FOR DIRECTED VERDICT ON PLAINTIFF'S CLAIM FOR BREACH OF THE IMPLIED WARRANTY OF WORKMANLIKE SERVICE.

The jury found in favor of the Plaintiff against Marick on two causes of action; negligence and breach of implied warranty of service. Marick does not take exception to the submission of those causes of action to the jury but rather argues that the jury's award against Marick is not supported by the evidence. To the contrary, the evidence is clear and overwhelming that Marick performed extensive work, as the general contractor for Phase I, and submission of that claim to the jury was entirely appropriate.

Bostic left the Stoneledge Phase I project in 2004. The evidence at trial indicated that when IMK and Marick arrived at the project, Phase I was largely in disrepair, having been vacant for the period of a year, with evidence of construction-related damage. (R. pp. 00513-00515, R. pp. 00715-00716). Marick then undertook the duty to repair the damaged condition of the Phase I units and to complete the remaining units. As noted previously, the work described in the building permits Marick pulled ranged from punch work in some units to work from the foundation up in other units. (R. pp. 02738-02759). The value of the work to be performed pursuant to the permits, as Marick estimated, was more than $1.4 Million. (R. pp. 02738-02759). Thus, Marick indisputably performed a substantial amount of work to the unfinished units in Phase I.

Described by Marick in its initial brief in this case, Marick also undertook to make repairs to Phase I units when early owners of those units (Taylor, White and others)

complained of water infiltration and other issues. Marick's Brief pp. 37-38. This included waterproofing repairs to the porches and decks (which were later discovered to be completely rotted) and to the foundation walls (which continued to leak). (R. pp. 00697-00698; R. pp. 00744-01139). Derek Hodgin, Plaintiff's expert, testified that those repairs failed to correct the deficiencies. (R. pp. 00744-01139).

Though there was conflicting testimony between the witnesses, the Plaintiff submitted evidence that Marick was aware of construction deficiencies at the time it assumed responsibility for the project. (R. pp. 00683-00723). This is supported by the reports of leaks the owners made to Marick, and Marick's failed response to those problems, and is also supported by the conditions Hodgin observed in two units that were still incomplete when he performed his investigation in 2009. At trial, photographs of those units, taken in 2009, were presented to Mr. Hornaday who testified that he observed conditions similar to those in the photographs when he was on site. (R. pp. 00704-00709; R. pp. 02091-03192; R. pp. 02804-02884). Those photographs show extensive staining from water infiltration around windows and doors on the backside of the exterior sheathing. The photographs and Hornaday's testimony support a conclusion by the jury that Marick was on notice of defects and failed to correct them. Mr. Hodgin testified that a contractor, on notice of those problems, would have a duty to investigate further to correct deficiencies of which he is aware. (R. p. 00967, lines 8-20)

Those photographs also showed evidence that the interior fire-rated walls were not properly constructed. Though Nathan Hornaday testified that Marick had been directed by the building official to correct those walls, Mr. Hodgin testified that the photograph in question was taken in 2009, long after Marick had completed its work on

Phase I and the units had all been sold. These facts support the conclusion that Marick failed to correct a significant life safety problem in at least one unit and suggests that it may not have done so in other units.

In sum, there was abundant evidence at trial that Marick undertook to do substantial work to not only complete but repair the units in Phase I and the evidence was equally compelling that Marick's efforts failed. Thus, this case is easily distinguished from *Roundtree*, which is simply not applicable to the facts here. Submission of the warranty of service claim to the jury was appropriate, and it would have been reversible error for the trial court not to have submitted the claim to the jury.

II. THE TRIAL COURT PROPERLY DENIED MARICK'S REQUEST FOR A JURY CHARGE THAT WAS UNSUPPORTED BY THE EVIDENCE.

Marick argues that the trial court erred by failing to give the jury a charge on "liability for subsequent builder making repairs" and that it is entitled to a new trial as a result (R. p. 01802, line 15-p. 01805, line 9). This argument fails for several reasons. First, Marick failed to preserve the argument by making a proffer of the requested charge. Second, there is no evidence that the court's failure to include the charge prejudiced or otherwise harmed Marick, which was found liable by the jury on each and every cause of action asserted.

To preserve an argument relating to a trial court's failure to make a requested charge, it is incumbent on the party seeking the charge to proffer it and make it part of the record, so that the appellate court can see the charge that rejected. *See Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990) (the appellate court will not review the failure to give a requested jury charge where the request to charge does not

appear on the record). Marick failed to do this, now only telling the court what it intended to charge. Because Marick failed to make the proposed charge part of the record, it has waived this argument.

Further, to warrant reversal, the party seeking the requested jury charge must demonstrate error and prejudice. *Fairchild v. S. Carolina Dep't of Transp.*, 385 S.C. 344, 351, 683 S.E.2d 818, 822 (Ct. App. 2009), aff'd, 398 S.C. 90, 727 S.E.2d 407 (2012). Jury instruction should be confined to the issues supported by the evidence. *Id.*

As noted above, the evidence at trial amply supported Plaintiff's claim against Marick for its work as a general contractor for Phase I. Further, Marick asked for and received the right to ask the jury to apportion that liability between it and Bostic, giving Marick the opportunity to explain its role to the jury and any failure to charge was harmless error.

III. A CHARGE ON THE WARRANTY OF HABITABILITY WAS HARMLESS ERROR BECAUSE THE HABITABILITY CAUSE OF ACTION WAS NOT ON THE VERDICT FORM AND THE JURY DID NOT FIND MARICK LIABLE FOR A BREACH OF THE WARRANTY OF HABITABILITY.

Marick argues the trial judge improperly charged the warranty of habitability. Again, Marick must show error and prejudice, which it cannot show because the verdict form did not include a cause of action for breach of the warranty of habitability, and the jury never awarded a verdict against Marick for breach of the warranty of habitability. (R. pp. 00024-00026). The jury found for the Plaintiff against Marick on two causes of action: negligence and breach of the implied warranty of workmanlike service. There was no verdict for breach of the implied warranty of habitability.

As Marick's counsel and Judge Macaulay noted, reference to habitability was made once and "buried" in the general charge on implied warranties. (R. p. 01960, line 7-20; R. p. 01971, line 6-p. 01972, line 1). After the jury began deliberating, the trial court received a request from the foreman to provide the charge on breach of warranty of workmanlike service and breach of fiduciary duty. (R. p. 01962, line 6-10). The trial judge informed counsel that he would bring the jury in and reread the requested charges, and Marick's counsel did not object. (R. p. 01962-01963).

In addition, Marick ostensibly argues that inclusion of the instruction was prejudicial due to closing arguments made by Bostic's counsel, however, Marick never objected to counsel's closing and has not preserved the issue. (R. p. 01988, line 2-p. 01990, line 13).

IV. THE TRIAL COURT PROPERLY SUSTAINED COUNSEL'S OBJECTION TO MARICK'S CLOSING.

Marick argues that the trial court improperly prevented it from making certain arguments to the jury. (R. pp. 01883-01885). As an initial matter, Marick failed to proffer its jury argument to the court, and thus has the argument is not preserved for review. *See Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990) (the appellate court will not review the failure to give a requested jury charge where the request to charge does not appear on the record). Moreover, the ruling was proper, and Marick is unable to prove that if sustaining the objection was an error, it was harmful error.

V. THE PLAINTIFF PRESENTED EVIDENCE THAT MARICK WAS A PROXIMATE CAUSE OF THE PLAINTIFF'S DAMAGES.

Marick next argues that Plaintiff failed to offer evidence that its numerous failures with respect to Phase I, including its failure to comply with the code in performance of over $1.4 million worth of completion work; its extensive, failed efforts to repair waterproofing on the porches and decks and foundation; and its disregard of open and obvious deficiencies that Hornaday admits he saw and did not repair were the proximate cause of Plaintiff's damages. Marick's proximate cause arguments fail as a matter of fact and law.

"Proximate cause does not mean the sole cause; the defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury." *Juaire v. United States*, No. 4:09-CV-709-TLW, 2012 WL 527598, at *11 (D.S.C. Feb. 16, 2012); *Small v. Pioneer Mach.*, Inc., 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997). A determination of proximate cause is a question of fact for the jury.

As noted previously, there was ample evidence of Marick's failure to do proper work in Phase I and its failure to address known conditions in Phase I prior to completing and selling the units. Those defects, combined with the neglect of Bostic, caused Plaintiff to suffer what the jury believed to be $5,000,000 worth of harm. While Marick's view of the evidence was that the damages associated with its neglect was limited to $250,000, this does not take into account, among other things, foundation repair problems, contract administration services, or the cost associated with emergency repairs. It also fails to recognize that the jury is free to assess damages proximately caused by the

conduct of the defendant, which it did in this case. In sum, the jury simply did not agree with Marick's assessment of the damages resulting from its negligence of breaches.

Finally, as with Marick's other arguments, to mitigate Marick's exposure in negligence and warranty, at Marick's request, the Court submitted to the jury the question of apportionment of damages, pursuant to S.C. Code Ann. §15-38-15. The statute's very purpose is to prevent a defendant who may have a small percentage of responsibility for the overall damages from being held jointly and severally liable for the entire claim. After hearing Marick's arguments both at closing and at the apportionment phase of the trial, the jury found Marick 40% responsible on the negligence cause of action. Thus, when Marick was given the opportunity to argue to the jury specifically that it was only a small part of the responsibility for the damages, the jury seemed to agree and reduced Marick's exposure.

With regard to the breach of implied warranty of service, the result is the same. In addition, Marick offered no evidence on its own behalf of the damages associated with what it contends is its discreet warranty exposure. As noted above, the damages are indivisible and, subject to application of the Apportionment Statute, Marick and Bostic are jointly responsible for those damages.

VI. THE PLAINTIFF SOUGHT ONE REMEDY AND WAS NOT REQUIRED TO ELECT.

Marick next argues that Plaintiff was required to elect between remedies. This argument reflects a misunderstanding of election of remedies, which is not applicable to this case. "Election of remedies involves a choice between different forms of redress afforded by law for the same injury.... It is the act of choosing between inconsistent remedies allowed by law on the same set of facts." *Taylor v. Medenica,* 324 S.C. 200,

218, 479 S.E.2d 35, 44–45 (1996); *Keeter v. Alpine Towers Int'l, Inc.*, 399 S.C. 179, 197, 730 S.E.2d 890, 899-900 (Ct. App. 2012). When a plaintiff seeks only one remedy, there is nothing to elect. *Creach v. Sara Lee Corp.*, 331 S.C. 461, 464, 502 S.E.2d 923, 924 (Ct. App. 1998); *Keeter v. Alpine Towers Int'l, Inc.*, 399 S.C. at 197.

Here, everyone including Marick, Plaintiff, and the trial court agree that the damages Plaintiff requested at trial, essentially the cost to repair, was the remedy the Plaintiff sought. Plaintiff sought no other remedy, inconsistent or otherwise. Thus, there was nothing for Plaintiff to elect. Marick is arguing that the Plaintiff was required to elect between causes of action, all of which sought the same remedy. But there is no requirement for Plaintiff to elect between causes of action when the Plaintiff seeks only one remedy.

VII. THE TRIAL JUDGE DETERMINED THAT THE VERDICT WAS CUMULATIVE AND PROPERLY APPLIED THE SET-OFF.

In this argument, Marick contends that the trial court improperly allocated the set-off and erred in holding that the jury's award at trial was cumulative, which resulted in the court's subsequent amendment of the verdict to reflect the entire judgment, $5,000,000, as to each cause of action. Both of Marick's contentions are incorrect.

Like Bostic in Appellate Case Number 2015-000417, Marick argues that the trial court should not have allocated the set-off among all causes of action and instead should have only allocated it among certain causes of action. Marick fails to acknowledge that after amendment of the judgment, the trial court ultimately applied the entire set-off to each cause of action. In the January 30, 2015 order, the court applied the full set-off to the negligence award, the award for breach of warranty of service, and the breach of

fiduciary award (with the full set-off being applied to each of the five defendants against whom that award was obtained). (R. p. 00035-00038). There is no scenario under which Marick could have received a greater share of the set off than the 100% it received.

Marick also takes exception to the trial courts finding that the jury's award was cumulative, citing with approval *Keeter* for the proposition that the trial judge was required to inquire of the jury about its intent. This position represents a disregard of what happened at trial and a misunderstanding of *Keeter*.

As noted previously, after the jury rendered its verdict, but before allocation and while the jury was still empanelled, counsel for the HOA asked the Court if the award was cumulative. In response, with no objection or request for inquiry from counsel for any defendant, the Court ruled as follows:

> Well, the way the Defendants have been treating it, yes, it is cumulative because they've been treating them all as separate little things that they want – what is it ? – apportionment on this one and apportionment on that one.

(R. p. 01979, line 8-p. 01980, line 18; R. p. 00231, line 5-p. 00234, line 8). Again, no Defendant objected to that ruling or requested that an inquiry be made of the jury, as counsel did in *Keeter*. Because Marick failed to object to the court's conclusion and failed to request an inquiry of the jury, it has waived this issue. *See Vigilant Ins. Co. of New York v. McKenney's Inc.*, 524 F. App'x 909, 914 (4th Cir. 2013) (denying Vigilant's motion for new trial because counsel did not bring the asserted inconsistency to the district court's attention before the jury was excused).

Second, contrary to Marick's contention here, *Keeter* does not require a colloquy between the judge and the jury. In *Keeter* the Court of Appeals held, "To determine the jury's intent in an ambiguous verdict, the court should consider the entire proceedings,

focusing on the events and circumstances that reasonably indicate what the jury intended." *Keeter v. Alpine Towers Int'l, Inc.*, 399 S.C. 179, 199, 730 S.E.2d 890, 900 (Ct. App. 2012). That is precisely what the trial judge did here, without the need to colloquy with the jury.

VIII. THE TRIAL COURT PROPERLY DENIED MARICK'S MOTIONFOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM

Marick fails to distinguish a typical common law claim for breach of fiduciary with the unique fiduciary duty articulated by the Supreme Court in *Concerned Dunes West Residents v. Georgia-Pacific Corporation,* 349 S.C. 251, 562 S.E.2d 633 (S.C. 2002). This claim, which Plaintiff pled and the court charged, is clearly spelled out in that case and is dispositive as to the issues Marick has raised on appeal.

Marick contends that in order to prevail on that claim, the HOA was required to provide evidence that Thoennes, who served on the board and was found personally liable for breach of fiduciary duty, had actual knowledge of defects at the time control of the association was turned over to the owners.

In fact, there was evidence in the record that Mr. Thoennes, a member of and the principal of Marick, was clearly aware of defects that a jury could infer put him on notice that pervasive defects existed throughout Phase 1 of Stoneledge, prior to the time control was turned over to the owners in 2008.

Further, nothing in the South Carolina cases discussing a developer's fiduciary duty to turn over the common elements in good condition requires that the HOA establish knowledge or notice by the developers who were in control of the association prior to turnover. While some cases include factual scenarios involving developers with actual

knowledge, a requirement of notice to the developer of defects is not among the elements of the claim. Rather, as stated in *Concerned Dunes West Residents v. Georgia-Pacific Corporation,* 349 S.C. 251, 562, S.E.2d 633 at 638 (S.C. 2002):

> That is to say the developer has a fiduciary duty to the POA to transfer common areas that are in good repair; if the developer transfers substandard common areas, the developer must, at the time of transfer, provide the POA with the funds necessary to bring the common areas up to a standard of reasonably good repair. The developer who breaches this duty, by transferring common areas that are not in reasonably good repair and without the funds necessary to bring the common areas to standard, is liable to the POA for all damages proximately flowing from the breach, including damages for the continued deterioration of these areas.

Furthermore, contrary to Marick's position, not all of the cases discussing the potential breach of fiduciary duty involve claims where developers had actual or constructive knowledge of problems at the time of turnover. *See Magnolia North Property Owners' Association v. Heritage Communities*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).

The trial court was not required to charge the business judgment rule. Again, as an initial matter, the proposed charge is not a part of the record, and Marick has waived the argument. Second, the cases Marick cites do not involve the particular fiduciary duty owed by a developer at the time of turnover, and Marick does not cite any authority for its proposition that the business judgment rule should be charged in this type of case. Moreover, any error cannot prejudice the defendant who presented no evidence establishing that its actions comported with requirements of the business judgement rule.

CONCLUSION

For these reasons, the Respondent requests the Court affirm the jury verdict and the orders from which Marick appeals.

Respectfully submitted,

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
342 East Bay Street
Charleston, SC 29401
Attorney for Respondent

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. 2015-000392

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC.,

RESPONDENT,

V.

IMK DEVELOPMENT CO., LLC, LLC, INTEGRYS KEOWEE DEVELOPMENT, LLC, MARICK HOME BUILDERS, LLC, BOSTIC BROTHERS CONSTRUCTION, INC., BRADFORD D. SECKINGER, WILLIAM COX, LARRY D. LOLLIS, RICK THOENNES

DEFENDANTS,

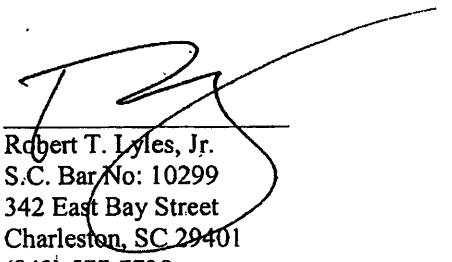
OF WHOM MARICK HOME BUILDERS, LLC, AND RICK THOENNES ARE THE

APPELLANTS,

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on counsel for the Appellants by depositing a copy in the United States Mail, First Class postage prepaid, this 29th day of August, 2016, to the following address:

Jason M. Imhoff, Esquire
Carl Reed Teague, Esquire
The Ward Law Firm, P.A.
Post Office Box 5663
Spartanburg, S.C. 29304
Attorneys for Marick Home Builders, LLC & Rick Thoennes



Robert T. Lyles, Jr.
S.C. Bar No: 10299
342 East Bay Street
Charleston, SC 29401
(843) 577-7730
rtl@lylesfirm.com
Attorney for Respondent

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. 2015-000392

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC.,

RESPONDENT,

v.

IMK DEVELOPMENT CO., LLC, LLC, INTEGRYS KEOWEE DEVELOPMENT, LLC, MARICK HOME BUILDERS, LLC, BOSTIC BROTHERS CONSTRUCTION, INC., BRADFORD D. SECKINGER, WILLIAM COX, LARRY D. LOLLIS, RICK THOENNES

DEFENDANTS,

OF WHOM MARICK HOME BUILDERS, LLC, AND RICK THOENNES ARE THE

APPELLANTS,

Certificate of Counsel

The undersigned hereby certifies that the Respondent's Final Brief complies with Rule 211(b), SCACR.

Robert T. Lyles, Jr.
S.C. Bar No: 10299
342 East Bay Street
Charleston, SC 29401
(843) 577-7730
rtl@lylesfirm.com
Attorney for Respondent

CONCLUSION

For these reasons, the Respondent requests the Court affirm the jury verdict and the orders from which Marick appeals.

Respectfully submitted,

Robert T. Lyles, Jr., Esquire
Lyles & Lyles, LLC
342 East Bay Street
Charleston, SC 29401
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

RECEIVED
AUG 30 2016
SC Court of Appeals

Appellate Case No. 2015-000392

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC.,

RESPONDENT,

v.

IMK DEVELOPMENT CO., LLC, LLC, INTEGRYS KEOWEE DEVELOPMENT, LLC, MARICK HOME BUILDERS, LLC, BOSTIC BROTHERS CONSTRUCTION, INC., BRADFORD D. SECKINGER, WILLIAM COX, LARRY D. LOLLIS, RICK THOENNES

DEFENDANTS,

OF WHOM MARICK HOME BUILDERS, LLC, AND RICK THOENNES ARE THE

APPELLANTS,

Certificate of Counsel

The undersigned hereby certifies that the Respondent's Final Brief complies with Rule 211(b), SCACR.

Robert T. Lyles, Jr.
S.C. Bar No: 10299
342 East Bay Street
Charleston, SC 29401
(843) 577-7730
rtl@lylesfirm.com
Attorney for Respondent