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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Alexander S. Macaulay, Circuit Court Judge

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, Petitioners-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 Respondents-Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION REGARDING PETITION FOR REHEARING

Counsel for Petitioners hereby certify that a Petition for Rehearing was filed with the South Carolina Court of Appeals on October 25, 2018, and the Order Denying Petition for Rehearing was issued on December 13, 2018.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err by re-allocating the cumulative verdict?

2. Did the Court of Appeals err by failing to properly apply the set-off to the entire jury verdict?

STATEMENT OF THE CASE

This construction defect case arises from the development and construction of a townhouse community on Lake Keowee (the "Project" or "Stoneledge"). In 2002, Bostic Brothers Construction, Inc. ("Bostic") began construction as the original general contractor of Stoneledge and was also an owner of the initial development company, Keowee Townhomes, LLC. Bostic constructed numerous units, and several units were in various stages of completion when Bostic ceased construction and ultimately entered into bankruptcy. In 2005 IMK Development Company (IMK), a development company comprised of Marick Home Builders, LLC (Marick) and Integrys Keowee Development LLC, purchased the Project and Marick took over building responsibilities. Rick Thoennes (Thoennes) was the license holder and managing member for Marick.

In 2010, the Plaintiff Stoneledge at Lake Keowee Owners' Association, Inc. (Plaintiff or Plaintiff HOA) filed an action against Bostic, IMK, Marick, Thoennes, and other development entities, and individuals. 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 and set a Phase I trial to begin on

October 28, 2013 with a Phase II trial to follow. The basis of that order was that the phases were developed by different developers (Bostic was not involved in Phase II), 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.

This appeal followed judgments entered after the Phase I jury trial. The HOA settled with some defendants, but went to trial on October 28, 2013, on the Phase I claims only against Bostic, IMK, Marick, Thoennes (and other IMK/Marick board members) alleging *inter alia*, negligence, breach of the implied warranty of workmanlike service, and breach of fiduciary duty. Plaintiff's expert Derek Hodgin provided expert testimony about the various construction defects at the Project. The HOA offered only one damages figure $6,309,197.00, which was comprised of the costs the HOA incurred to temporarily make repairs and the estimated future cost to repair. In response, Bostic offered evidence of a scope of repair developed by its expert, Rick Moore, and a price to implement that scope totaling $2,200,130.93.

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 against Bostic and Marick ($3,000,000.00), breach of warranty of service against Bostic and Marick ($1,000,000.00), and breach of fiduciary duty against IMK Development Co., Integrys Keowee Development, Rick Thoennes, William Cox and Larry Lollis ($1,000,000.00). Immediately after the jury rendered its verdict, but before allocation, and while the jury was still empaneled, counsel for the HOA asked the Court if the award was cumulative. In response, with no objection or inquiry from counsel for any defendant, the Court held the award was cumulative. The trial court stated, "Well the way Defendants have been treating it, yes, it is cumulative..." Again, no Defendant objected to that ruling or requested that an inquiry be made of the jury on that issue. At the request of Defendants, the Court allowed apportionment

pursuant to S.C. Code § 15-38-15 under the negligence and breach of warranty causes of action. After deliberating, the jury allocated sixty percent (60%) of the negligence to Bostic and forty percent (40%) to Marick and allocated seventy percent (70%) of the breach of warranty to Marick and thirty percent (30%) to Bostic.

Plaintiff filed a Motion to Alter or Amend (Motion for Entry of 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 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.

Judge Macaulay presided over a hearing on all post-trial motions on April 10, 2014. As requested in Plaintiff's Motion to Alter or Amend (Motion for Entry of Judgment) 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. As to the Plaintiff's claim for negligence against Marick and IMK, the court entered judgment of $857,635.29. As to Plaintiff's breach of warranty claim against Marick, the court entered judgment of $2,144,088.23 in favor of Plaintiff. As to the claim for breach of fiduciary duty against IMK and Rick Thoennes, the state court entered judgment in favor of Plaintiff in the amount of $2,144,088.23. [1]

Bostic and Marick filed separate appeals. The Court of Appeals issued opinions in both on the same day. In this case, the Marick appeal, the Court of Appeals affirmed in part and reversed in part. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, Op. No. 5600 (S.C. Ct.

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1 As to the Plaintiff's claim for negligence against Bostic, the court entered judgment of $2,144,088.23. As to Plaintiff's breach of warranty claim against Bostic, the court entered judgment of $643,226.47 in favor of Plaintiff. The amount of the judgment against Marick was not reduced on the warranty claim based on S.C. Code § 15-38-15 because the jury

App. filed October 10, 2018) (Stoneledge I). Petitioner seeks a writ of certiorari to review the opinion.

ARGUMENTS

1. THE COURT OF APPEALS SHOULD HAVE AFFIRMED THE CUMULATIVE VERDICT OF A SINGLE DAMAGE.

In this case, the Plaintiff HOA sought recovery of one single damage, which was the cost to repair the Phase I buildings. The jury determined that the damage was $5,000,000, which was less than the total cost of repair claimed by Plaintiff and greater than the repair cost of the defense expert. That single damage, the cost to repair, was the measure of damages for all of the causes of action asserted by the Plaintiff against all of the Defendants. Despite the form of the jury verdict, the trial judge knew and understood that only one damage has been claimed and proven which is why, as noted by the Court of Appeals, he held that the jury verdict was a "cumulative award."[2] The Court of Appeals correctly held that this finding was unchallenged by the Defendants and is the law of the case.

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

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determined Marick was more than 50% at fault.

2 Opinion 5600, Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC, 425 S.C. 276, 300, 821 S.E.2d 509, 521 (Ct. App. 2018), reh'g denied (Dec. 13, 2018). Both Opinion 5601 (Stoneledge II) and Opinion 5600 (Stoneledge I) were filed on the same day. The Court of Appeals opinion in this matter (Opinion 5601) incorporates by reference Opinion 5600.

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

Importantly, his post-trial amendment of the verdict did not usurp the authority of the jury or change the jury's verdict. He simply applied the jury's findings, based upon his extensive observation of the trial and the evidence presented, and correctly applied the jury's verdict, $5,000,000, as the cumulative award for a single damage. *See Vinson v. Hartley*, 324 S.C. 389, 406, 477 S.E.2d 715, 724 (Ct. App. 1996).

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

2. THE COURT OF APPEALS SHOULD HAVE APPLIED THE SET OFF TO THE ENTIRE VERDICT.

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

It is the law of the case that the damages awarded by the jury were "cumulative" and it is

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

The law of set-off is clear and is articulated by the Court of Appeals in *Smith v. Widener*, 397 S.C. 468, 724 S.E. 2d 188 (Ct. App. 2012). Like *Smith*, although the Plaintiff HOA in this case may have "stated that claim in various causes of action," the injury it suffered as a result of the tortious conduct of all defendants was the same. *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012).

If the verdict is to be artificially re-allocated among the causes of action, which Plaintiff HOA believes is not proper, the set-off ($2,855,911.77) should have been applied to the entire cumulative verdict ($5,000,000) for a net verdict of $2,144,088.23. While disagreeing with the Court of Appeals reallocation of the verdict, if the verdict is reallocated as on the verdict form, the set-off, reallocated verdict should have been $1,286,452.94 for negligence, $428,817.65 for breach of warranty and $428,817.65 for breach of fiduciary duty. Applying the jury's apportionment, the result would be verdicts against Bostic, Marick, and Thoennes as follows:

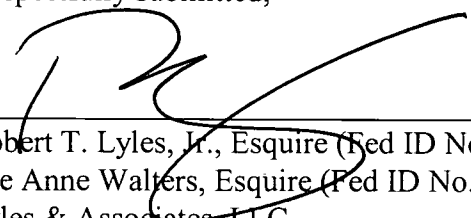
Bostic:	Negligence (100%) — $1,286,452.94 Breach of Warranty (30%) — $128,645.30 Total: $1,415,098.24
Marick:	Negligence (40%) — $514,581.17 Breach of Warranty (100%) — $428,817.65 Total: $943,398.82
Thoennes:	Breach of Fiduciary Duty — $428,817.65

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the petition for a writ of certiorari.

Signature Block to Follow

Respectfully submitted,



February 1, 2019

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Of Which Marick Home Builders, LLC and Rick Thoennes are the Respondents-Petitioners.

PROOF OF SERVICE

I certify that I have served the Petitioners' Petition for Writ of Certiorari on counsel for the Respondents by depositing a copy in the United States Mail, First Class postage prepaid, this 1st day of February, 2019, addressed to the following:

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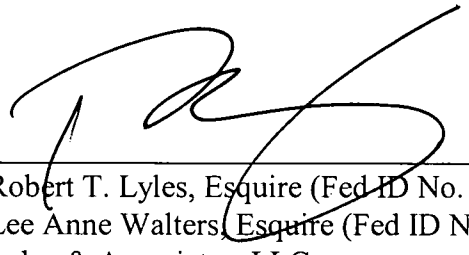

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