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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.

PETITIONERS-RESPONDENTS' RETURN TO RESPONDENTS-PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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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 Respondent Stoneledge at Lake Keowee Owners' Association, Inc. (hereinafter "Respondent") 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. Respondent'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 Respondent 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.

Respondent 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, Respondent 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 Respondent'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 Respondent from the settling defendants. As to the Respondent's claim for negligence against Marick and IMK, the court entered judgment of $857,635.29. As to Respondent's breach of warranty claim against Marick, the court entered judgment of $2,144,088.23 in favor of Respondent. As to the claim for breach of fiduciary duty against IMK and Rick Thoennes, the state court entered judgment in favor of Respondent 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. App. filed October 10, 2018) (Stoneledge I). A Petition for rehearing was filed on October 25, 2018 and was denied on December 13, 2018. Petitioner served this Petition for Writ of Certiorari on February 1, 2019. This Return is timely.

STATEMENT OF FACTS

This underlying 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").

1 As to the Respondent's claim for negligence against Bostic, the court entered judgment of $2,144,088.23. As to Respondent's breach of warranty claim against Bostic, the court entered judgment of $643,226.47 in favor of Respondent. 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 determined Marick was more than 50% at fault.

The HOA is responsible for maintenance, repair and replacement of the building envelopes, roofs, porches and decks of the Stoneledge. Trial Tr. 219:6-11.

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. Trial Tr. 634:15-22. 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. Trial Tr. 416: 1-9, 419:23-420:2, 467:12-468:11, 1149:12-20.

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"). Trial Tr. 1146:3-8. Marick assumed the role of general contractor, obtained new building permits on 25 partially completed units, and began work on Phase I in 2005. Trial Tr. 1146:3-8; Trial Ex. P-16. Rick Thoennes was the managing member and license holder for Marick. Trial Tr. 1139: 23-25. Rick Thoennes assigned Nathan Hornaday as the Superintendent for the Project. Trial Tr. 464:7-14, 469:1-478:19.

Marick and Thoennes performed extensive work at the project to complete the build-out of Phase I. See Trial Tr. 498:24-506:20; Trial Ex. P-16. To complete the units in Phase I, Marick was required to pull a number of building permits. Trial Tr. 464:7-466:25; 469:1-478:19. Trial Ex. P-16. On the building permits, Marick represented the nature of the work it was going to undertake and assigned a value to that work. Trial Tr. 464:7-466:25; 498:24-506:20; Trial Ex. P-16. 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. Trial Tr. 498:24-

506:20, Trial Ex. P-16. The value of the work to be performed pursuant to the permits, as estimated by Marick, was more than $1.4 Million. Trial Ex. 16; Trial Tr. 498:24-506:20; 1147:19-1148:11. To pull the permits, Marick had to certify that the work it was going to perform would comply with applicable building codes and ordinances. Trial Tr. 498:24-506:20.

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. Trial Tr. 498:24-506:2, 1151:8-25. 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. Trial Tr. 216:23-222:1, 303:1-305:1, 1110:2-10; Trial Ex. P-2,P-3, P-4, P-7. IMK remained in control of the board of the HOA until September 2008. Trial Tr. 1050: 3-5, Trial Ex. P-2. At that time, control of the board was turned over to the owners who, collectively through the HOA, are the Respondents in this action. Trial Ex. P-2.

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. Trial Tr. 1169:21-1170:17.

Respondent's expert Derek Hodgin provided expert testimony about the various construction defects at the Project. Trial Tr. 643-923; Trial Ex. 27-28. Hodgin developed a scope of repair for the defects and damages he discovered in Phase I (Trial Ex. P-27), and Respondent 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. Trial Tr. 1387:15-1388:13; 1389:3-7; 1443:18-22; 1460:23-1462:24. 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. Trial Tr. 1021:4; Trial Exhibit P30; Trial Tr. 1491:21-23, 1512:9-1513:18; Trial Exhibit DB-4. 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 Respondent in the amount of $5,000,000 on three causes of action: negligence, breach of warranty of service, and breach of fiduciary duty. Verdict Form, November 8, 2013. 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. 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.

Trial Tr. 1763:8-1764:18; Post Trial Motions Tr. 15:5-18:8. 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. Once the jury decided that issue, the jurors were released with the consent of the defendants. Trial Tr. 1763-1782.

On November 8, 2013, the Court entered a Form 4 order of judgment. Verdict Form, November 8, 2013. Respondent 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. Motion to Alter or Amend, Letter dated November 25, 2013. By letter dated November 25, 2013, Respondent 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. Letter of Lyles dated November 25, 2013. No defendants objected to the amount of settlements received by Respondent for Phase I as set forth in the letter.

As requested in Respondent'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 Respondent recovered from settling defendants. Form 4 Judgment, January 30, 2015.

ARGUMENTS

Marick has pointed to five errors in its Petition, but then structures its argument differently. Respondent will respond to the arguments, as presented by Marick, below. As an initial matter, however, Rule 242, SCACR provides that the following are generally accepted and articulated reasons for the Supreme Court to accept Certiorari:

> **(1)** Where there are novel questions of law.
>
> **(2)** Where there is a dissent in the decision of the Court of Appeals.
>
> **(3)** Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> **(4)** Where substantial constitutional issues are directly involved.
>
> **(5)** Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Marick's Petition is largely devoid of any of those stated basis for Certiorari. Reasons 2, 4 and 5 are simply not applicable and Marick does not argue that the Court of Appeals ruling is in conflict with a prior decision of the Supreme Court or that its Petition presents novel questions of law. Marick simply believes that the Court of Appeals decided the case the wrong way and most of not all of its Petition is the regurgitation of arguments previously made a rejected by the Court of Appeals. That is a primary basis that Marick's Petition should be denied.

Respondent responds to the arguments of Marick below.

I. JURY CHARGES.

A. Liability Charge.

As it has for years, Marick now asks the Supreme Court to hold, as a matter of law, that it was not a contractor for Phase I and to limit its liability to that of a "lender", with not involvement in construction or repair of a project, under *Roundtree Villas As.s"n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415 (1984). Marick contends that Bostic and only Bostic can be held liable for the faulty work in Phase I. In making the argument Marick continues to misstate the claim that was asserted against it and to ignore the evidence that was presented at trial.

Marick was not sued because Respondent wanted to impose Bostic's liability vicariously on Marick. Also,the Respondent' has 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 after it was abandoned, and left incomplete, by Bostic. Only a portion of the units were completed by Bostic and Marick undertook to complete the vast majority of the units before selling them, through Marick's own development company, IMK. Before doing that work, Marick pulled new building permits for the incomplete units, representing that it was going to do $1,400,000 worth of construction to complete the units. Marick also undertook to perform extensive repairs to Bostic's shoddy work. (R. pp. 02738-02759). While Marick now says those permits were "misstated", those permits were secured by Marick and alone establish that Marick's role in Phase I was not that of a distantly removed "lender". The evidence at trial also supported a finding that Marick knew of other problems at the project, caused by Bostic, and negligently 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), opting instead to simply sell the units to the public, defects included.

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 discussed *Roundtree* and noted 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 proposition is simple: where a party does not actively perform work, it may not be responsible for it, but a party is and always has been responsible for the work it did perform and for work that it did not perform but should have performed. That is why Marick was sued for negligence and breach of implied warranty of service for Phase I.

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, performed faulty repair work and for not repairing work that it knew needed to be repaired (discussed in more detail below).

As the court noted in *Roundtree*, the liability of the lender for faulty repairs undertaken on its behalf was a jury question. In this case the question of Marick's negligence for work it performed, and work it should have performed and did not, was put before the jury which concluded that Marick was negligent and that it violated the implied warranty of service.

Once Marick's liability was established, the jury was then free to assess the extent of the damage caused by Marick. If that damage combines with that of Bostic to result in a single harm to

Stoneledge, Marick and Bostic are both responsible for it. 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 Respondent 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 Respondent.

B. Breach of Implied Warranty of Habitability Charge.

Marick continues to argue that the trial judge improperly charged the warranty of habitability. However, Marick cannot show harm 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).

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 and thereby waived this argument. (R. p. 01962-01963).

In its Petition, Marick argues that inclusion of the instruction was prejudicial due to closing arguments made by Bostic's counsel (p. 14 of Marick's Petition). This argument is disingenuous. The referenced quote from the argument of Bostic's counsel came in the *apportionment phase* of the trial, after the jury had already rendered its verdict. Further, Marick never objected to counsel's closing and has not preserved the issue. (R. p. 01988, line 2-p. 01990, line 13).

II. DIRECTED VERDICT MOTIONS.

A. Breach of Implied Warranty of Workmanlike Service.

As with its "Liability Charge" argument, Marick takes the position that the implied warranty of service does not apply because it was not the contractor for Phase I. This argument flies in the face of the evidence that was presented at trial and in the face of the applicable law which is clear and overwhelming that Marick performed extensive work in 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, Respondent's expert, testified that those repairs failed to correct the deficiencies. (R. pp. 00744-01 139).

Though there was conflicting testimony between the witnesses, the Respondent 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 1 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.

B. Proximate Cause.

Marick next argues that it's work in Phase I caused, at most, $250,000 in damages. That argument is based upon testimony of Respondent's estimator who was discussing repair costs, not allocating responsibility for those costs. As the facts immediately above make clear, the damages associated with Marick's work were not only related to the correction of faulty work but were also related to Bostic's work that Marick should have corrected and did not, and to the repair of and damage caused by improperly performed repairs to Bostic's work that Marick undertook.

"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. Here, the jury determined that the damage caused by Marick, combined with that of Bostic, totaled $5,000,000.

Finally, as noted above, 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.

III. BREACH OF FIDUCIARY DUTY.

Marick argues that the Court of Appeals erred in its assessment of Marick's liability for breach of fiduciary duty but points to no contrary Supreme Court law and does not make any argument that this is a novel question of law. Marick just believes that the Court of Appeals made a mistake.

The Court of Appeals decision is fully supported by the facts of the case, as noted in their opinion, and is further supported below in Stoneledge's arguments about amalgamation.

IV. AMALGAMATION.

In its petition, Marick raises the question of amalgamation. In doing so, Marick makes arguments that were not made previously, in either the trial court or the Court of Appeals, and which are therefore not preserved.

The trial court concluded that the evidence supported a finding that IMK, Marick and others were amalgamated. The testimony at trial was compelling about the blurred distinctions between those companies and the people who acted on their behalf. It also included Thoennes's testimony that, as the principal and license holder for Marick, which was a member of IMK (that is what the "M" in IMK stands for), and a member of the HOA Board of Directors for three years, he wore multiple hats at all times (developer/seller, board member and contractor). He was joined on the HOA Board by Bill Cox, a member of IK which was also a member of IMK (hence the "I"). Both were on the board by virtue of IMK's right to control the Board until they elected to cede control to the owners. (Neither Marick or IK had any right to control the Board.). The evidence also included

testimony from homeowners who testified that they did not know what if any distinctions exited between IMK, Marick, the other entities, Thoennes or Cox, thus clearly satisfying the requirements for amalgamation enunciated in *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 344 S.E.2d 869 (1986).

The Court of Appeals conducted its own review of the evidence and concluded that amalgamation was proper, applying the factors recently enunciated in *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 655, 817 S.E.2d 273, 280–81 (2018), reh'g denied (Aug. 16, 2018). Marick disagrees with that but Marick's Petition should be denied for several reasons.

First, at the trial court level and in the Court of Appeals, Marick failed to argue the "single business enterprise" concept or the law that supports it. Instead, Marick argued that individuals and companies cannot be amalgamated and that there was no evidence that Marick, IMK and the other members and entities shared office space and phone numbers. While that was a factor considered by Judge Newman in *Magnolia North*, it is not a hard and fast requirement for *Kincaid* amalgamation. Instead, the trial court and the Court of Appeals properly focused on the fact that the way IMK, Marick, the other entities, Thoennes and Cox did business at Stoneledge, which included a blurring of distinction between those entities and individuals to the extent that the unit owners testified they did not know which entity was doing what among them.

As noted in the Court of Appeals decision, amalgamation law, refined by *Petruis* in 2018, now "requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." In that decision, the Supreme Court reviewed a number of amalgamation cases and adopted the requirements for amalgamation from those cases. None of those cases was ever cited by Marick in this case at any level. Marick also never argued or

contended that evidence of "bad faith, abuse, fraud, wrongdoing, or injustice" was required for amalgamation, thus waiving the right to assert a failure of proof based on that now.

Second, as found by the Court of Appeals, the *Pertuis* factors were satisfied in the trial. The jury found that the personal representatives of IMK, Thoennes and Cox, breached their fiduciary obligations to the owners. Evidence was introduced that Marick and Thoennes, the license holder and construction arm of IMK, observed deficient work of Bostic and simply failed to correct it, instead keeping costs down and selling the units to the public through IMK. Thoennes admitted to performing three central roles of contractor, board member and developer/seller, all at once with the full knowledge of IMK Cox and the others. Those three roles alone establish unfair dealing, injustice and wrongdoing since they are inherently in conflict. For example, as contractor Marick should want to make all repairs necessary while as developer, it wants to keep costs down and profits up. A board member, who must put the interests of the members of the HOA ahead of his own other interests, has an irreconcilable conflict when he knows of problems requiring correction but also stands to profit from the sale of the distressed units. While it would clearly be in the best interests of the owners to have the developer and the contractor correct all repairs, when they control the board there is no disinterested person to assert those interests.

As Marick pointed out in its Court of Appeals brief, after two weeks of trial, the trial judge found that IMK, Marick, Thoennes, Cox and Lollis has engaged in "self-dealing". That is obvious. The structure of this project, and the fact that Thoennes, Cox, IMK and Marick were so conflicted is what led to the problems at Stoneledge being passed along to the unit owners. It would be manifestly unfair to allow those people and entities to now claim the protection of corporate structure when they casually disregarded it during the completion and sell-out of this project to the public and after they controlled the Board for three critical years despite their clear conflicts of interest.

Finally, Marick argues that amalgamation cannot be sued to amalgamate individuals and corporate entities, but offers no authority for that position or even any reason why that should be the law. The argument, advanced by Marick, is also backwards. It is individuals who are protected by corporate structure. In this case, as noted by the Court of Appeals, Lollis was the individual found liable for corporate actions by virtue amalgamation, even though there was no evidence of any tortious conduct on his part.

Here, Marick is arguing that it should not be liable for the actions of Thoennes, its principal and license holder who personally sat on the Stoneledge Board in furtherance of the business interests of IMK and Marick. Corporate entities can *only* liable because of the actions of their employees and members, since they cannot undertake any action on their own. The Court of Appeals correctly held that Marick is liable for the actions of Thoennes and no amalgamation theory was required for that. While under appropriate facts Thoennes might try to insulate himself from personal liability for the corporate actions of Marick, that is not in issue here. Marick is absolutely liable for actions of Thoennes undertaken in furtherance of Marick's business. In that instance, as it was in the minds of the owners at Stoneledge, the name Thoennes is synonymous with Marick. There is no distinction at all between what Thoennes is liable for and what Marick is liable for, amalgamation or not.

CONCLUSION

For the reasons set forth above, Petitioners-Respondents respectfully request this Court to deny the Appellants' Marick Home Builders, LLC and Rick Thoennes' Petition for Certiorari.

Signature Block to Follow

Respectfully submitted,

Robert T. Lyles by/Margaret Griffin

February 11, 2019

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
FEB 13 2019
S.C. 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.

PROOF OF SERVICE

I certify that I have served the Petitioners-Respondents' Return to Respondents-Petitioners' Petition for Writ of Certiorari on counsel for the Respondents-Petitioners by

depositing a copy in the United States Mail, First Class postage prepaid, this 11th day of February, 2019, addressed to the following:

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