

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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SC Court of Appeals

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

Of Which Bostic Brothers Construction, Inc. is the Respondent-Petitioner.

**PETITIONERS-RESPONDENTS' RETURN TO
RESPONDENT-PETITIONER'S PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

This construction defect case arises from pervasive defects and resulting damage at an 80-unit townhome project on Lake Keowee in Oconee County (the "Project" or "Stoneledge"). Plaintiff-Respondent Stoneledge at Lake Keowee Owners' Association, Inc. (hereinafter "Respondent") instituted this lawsuit on May 29, 2009, and subsequently amended the complaint to add Appellant Bostic Brothers Construction, Inc. ("Bostic"), alleging negligence and breach of warranty causes of action. Bostic was served on March 29, 2010. Bostic and the other defendants were the developers, contractors, and subcontractors responsible for the development, construction and sale of Stoneledge units and also the management of the HOA Board of Directors until September 2008, when control was turned over to the homeowners.

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. 21-28). 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. 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.

The trial relating to the HOA's claims for Phase I began on October 28, 2013, and resulted in a jury verdict against Bostic in the amount of \$5,000,000. The trial judge determined the verdict was cumulative, and the jury was dismissed without objection. (R.

p. 2055, line 8-p. 2056, line 18; R. p. 2090, line 5-p. 2093, line 8). On November 8, 2013, the Court entered a Form 4 order of judgment. (R. pp. 29-32). Bostic 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. 2194-2197; R. pp. 2757-2759). 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. (R. pp. 2757-2759). 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. 2076-2156). Defendants' motions were not ruled on until January 22, 2015, at which point they were denied. (R. pp. 17-20).

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. 41-43).

On August 19, 2016, Bostic filed its final briefs to the South Carolina Court of Appeals. On August 23, 2016, Plaintiff filed its final brief to the Court of Appeals. The matter was filed under Appellate Case No. 2015-000417. On December 17, 2017, Oral argument was held and the Court of Appeals filed Opinion No. 5601. On October 25,

2018, Plaintiff filed a Petition for Rehearing to the Court of Appeals, which was followed by Bostic's Petition for Rehearing filed on November 21, 2018. These petitions were denied on December 13, 2018. Bostic subsequently filed a Petition for Certiorari to this Court on January 14, 2019, and Plaintiff responds in kind with this Return pursuant to 243(g), SCACR.

STATEMENT OF THE FACTS

The HOA is responsible for maintenance, repair, and replacement of the building envelopes, roofs, porches, and decks of all Stoneledge units. (R. p. 0903, lines 6-11). The Project was developed in two phases. Phase I consists of eight (8) buildings representing thirty-seven (37) individual units. Bostic served as the original general contractor, and was also an owner of the initial development company, Keowee Townhomes, LLC. (R. p. 0926, lines 15-22). Bostic constructed and sold numerous units, and several units were in various stages of completion when Bostic ceased construction and ultimately entered into bankruptcy. (R. p. 0708, lines 1-9; R. p. 0615, lines 5-10; R. p. 0759, line 12-p. 0760, line 11).

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. 1438, lines 3-8). IK is comprised of William Cox, Tim Roberson and Larry Lollis. At that point, Marick assumed the role of general contractor for the completion of Phase I and the entire development of Phase II. (R. pp. 0634, line 25-p. 0635, line 2). Rick Thoennes was the managing member for Marick. (R. p. 1431, line 23-p. 1432, line 25).

IMK created a homeowner's association and filed a Declaration of Covenants and bylaws in November 2005, and named Rick Thoennes, William Cox, Tim Roberson as board members. (R. p. 0508, line 23-p. 0514, line 1; R. p 0595, line 1-p. 0597, line 1; R. p. 1402, lines 2-10; R. p. 2271-2272; R. pp. 2323-2359; R. p. 2363). IMK remained in control of the board of the homeowner's association until September 26, 2008. (R. p. 2271).

On October 28, 2013, a jury trial commenced on the Phase I claims only. The HOA offered only one damages figure, which was comprised of the costs the HOA incurred to temporarily make repairs and the estimated future cost to repair. The HOA claimed damages totaling \$6,309,197.00. 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.

At trial, the Plaintiff's witnesses included homeowners Robert White, Steve Taylor, Donna Furnari, and Michael Furnari. Each testified about their knowledge of the problems at Stoneledge. Steve Taylor testified that when Bostic left the project, he did not know anything about the quality of construction in the unfinished units. (R. p. 0590, lines 5-14). Mr. Taylor also testified that he had various problems in his unit. Marick repaired, or attempted to repair these problems. (R. p 0597, line 15-p. 0600, line 20).

Mr. Taylor became president of the HOA board when it was first turned over to the homeowners in 2008. According to his testimony, in late 2008, heavy rains followed a long drought, and multiple Phase I units began showing significant water infiltration problems. (R. p. 0603, line 9-p. 0606, line 3; R. p. 0620, line 21-p. 0621, line 12.). Steve Taylor and Robert White, another homeowner, both testified certain latent deficiencies

were not discovered until 2009, when a report of a handrail problem in the unit of owner Jim Logan revealed severe rot and deterioration behind the stone facade. (R. p. 0606, line 14-p. 0607, line 19; R. p. 0624, line 10-p. 0625, line 12).

Mr. Thoennes, a licensed general contractor and managing member of Marick, which was also a member of IMK, sat on the board of the association until September of 2008, and made a number of repairs in response to owner complaints. (R. p. 1460, line 25, p. 1462, line 17). Mr. Thoennes specifically testified that during the operative time, he was wearing a number of hats, including contractor, head of the sales department for IMK, and, to some degree, a member of the board. (R. p. 1161, line 21- p. 1162, line 17). Mr. Thoennes refused to admit that he communicated information regarding the repairs requested of him while wearing his “contractor hat” to the homeowners’ association board. (R. p. 1457, line 23-p. 1458, line 22; R. p. 1459, line 20-p. 1460, line 7).

Plaintiff’s expert Derek Hodgin provided expert testimony about the various construction defects at the Project. (R. pp. 0820-0919; R. pp. 2407-2685). Plaintiff presented evidence of repair damages totaling \$6,309,197.

Bostic’s own 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. 1677, line 15-p. 1688, line 13; R. p. 1735, lines 18-22; R. p. 1752, line 23-p. 1754, 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 of contract administration services, which Watkins were necessary) and \$2,200,130.93 to implement the defendants’ reduced scope of work (which was increased at trial to \$2,470,000). (R. p. 1312, line 20-p. 1318, line 7; R. p. 2712; R. p. 1779, line 13-p. 1782, line 6; R. p. 1792,

line 5; R. pp. 1804-1805; R. p. 2717). Further, Bostic's principals, Joe and Jeff Bostic and Mel Morris, acknowledged defects at the Property and testified that the owners were entitled to a proper and full repair. (R. p. 0926, line 23-p. 0927, line 16; R. p. 0924, line 4-5; R. p. 0925, Lines 1-10; R. p. 0932, lines 11-24; R. p. 0933, lines 12-20; R. p. 0683, line 21-p. 0694, line 1).

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 (\$3,000,000.00), breach of warranty of service (\$1,000,000.00), and breach of fiduciary duty (\$1,000,000.00). (R. pp. 29-35). At the request of Defendants, the Court allowed apportionment of the awards under the negligence and breach of warranty causes of action. 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. 36). 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 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 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. 2055, line 8-p. 2056, line 18; R. p. 2090, line 5-p. 2093, line 8). Again, no Defendant objected to that ruling or requested that an inquiry be made of the jury on that issue while the jury was empanelled. Instead, the defendants merely argued their positions with respect to apportionment. The jury was released after deciding the apportionment issue was decided without anything further being requested by any defendant.

On November 8, 2013, the Court entered a Form 4 order of judgment. (R. p. 29-36). 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. 2194-2197; R. pp. 2757-2759). By letter dated November 25, 2013, Plaintiff clarified the prior settlement amounts \$2,855,911.77 received from defendants for Phase I damages 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. pp. 2757-2759). None of the defendants objected to the amount of prior Phase I settlements 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 recovered by the Plaintiff from the settling defendants. (R. pp. 41-43).

ARGUMENTS

I. APPLICATION OF A SETOFF AWARD IS SUBJECT TO JUDICIAL DISCRETION

A. The Court of Appeals' decision regarding the application of the setoff award is discretionary, and Bostic's petition fails to satisfy the standards required for certiorari under Rule 242

Bostic argues that the Court of Appeals made an error in applying the \$2,855,911.77 award subject to a setoff from the settling tortfeasors. This argument, however, fails to satisfy the requirements of certiorari under Rule 242, SCACR. In order to petition the South Carolina Supreme Court for a Writ of Certiorari, Rule 242(b), SCACR, provides that the circumstances under which a petition can be made are where: i) there is a novel question of law; ii) there is a dissent in the Court of Appeals decision; iii) the decision of the Court of Appeals is in conflict with the prior decision of the Supreme Court; iv) substantial constitutional issues are involved; and v) a federal question is included in the decision of the Court of Appeals with a decision of the United States Supreme Court. Here, Bostic's argument fails to satisfy any of the Rule 242(b) criteria.

Furthermore, applications of setoff awards are subject to the discretion of the court. *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 219, 528 S.E.2d 682, 688 (S.C. Ct. App. 2000). In its decision, the Court of Appeals determined that the calculation of the setoff award would leave a \$2,144,088.23 judgment to allocate between the negligence and breach of warranty claims. Therefore, the decision of the Court of Appeals regarding the application of the setoff award should be left to discretion of the Court of Appeals and a challenge of such an award should be denied for failing to meet the criteria for review by the Supreme Court.

B. A setoff is equitable in nature and properly determined by the trial court

Additionally, Bostic argues that the Court of Appeals' holding as to the application of setoff is contrary to the law. Bostic erroneously seeks to have the setoff applied only to the negligence cause of action based upon Bostic's belief that the South

Carolina Contribution Among Joint Tortfeasors Act (SCCAJA) provides the only basis for setoff.

However, although the SCCAJA provides for reduction of the verdict to account for amounts paid by settling tortfeasors, a setoff can also apply to other causes of action. *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 219, 528 S.E.2d 682, 688 (S.C. Ct. App. 2000) (“A set-off is not necessarily founded upon ‘any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction’ of the court; therefore, such motions are ‘addressed to the discretion of the court....’” (quoting *Rookard v. Atlanta & Charlotte Air Line Ry.*, 89 S.C. 371, 376, 71 S.E. 992, 995 (1911))). In this case, the trial court applied the full amount of the set-off to all of the causes of action so that each defendant enjoyed in full the right to reduction in the amount of the verdict to ensure that the HOA did not recover twice.

C. Court of Appeals provided holding as to Bostic regarding the allocation of the setoff award

In regard to the Court of Appeals’ holding as to the setoff award, Bostic argues that the Court of Appeals failed to provide a holding against Bostic. In fact, the Court of Appeals did provide a holding as to the setoff award for Bostic.

In its Opinion No. 5600, the Court of Appeals noted that the jury verdict provided a \$5 Million damages award with \$3 Million being applied to the negligence cause of action, and \$1 Million being applied to each the breach of implied warranty and breach of fiduciary duty causes of action. Additionally, the jury apportioned 40% of fault to Marik on the negligence claim, which left 60% of fault on Bostic; and it apportioned 70% of fault to Marik on the breach of implied warranty cause of action, which left 30% of fault on Bostic.

The Court of Appeals then held that the trial court invaded the province of the jury by finding that each cause of action independently supported a \$5 Million verdict. The Court of Appeals then reapportioned the setoff by saying it did not apply to the fiduciary duty claim (which Stoneledge contends was a legal error). Since the award for that cause of action was \$1 Million. That left a balance of \$4 Million to which to apply the set-off. The Court of Appeals deducted the amount of the prior settlements, applying three quarters of that amount to the award for negligence and one quarter to the award for breach of warranty. That left a total remaining for the negligence award of \$1,608,066.17, and \$536,022.06 for the warranty claim. In this way, the Court of Appeals provided a holding as to Bostic on the setoff. That is, since Bostic was adjudicated 60% responsible for the negligence award, under the Apportionment statute it is liable for 100% of the negligence award for a total of \$1,608, 066.17. Since Bostic was adjudicated 30% responsible for the warranty claim, under the Apportionment Statute it would only be responsible for 30% of the breach of implied warranty award totaling \$160,806.62.

II. THE COURT OF APPEALS PROPERLY UPHELD THE TRIAL COURTS' DECISION TO DENY BOSTIC'S MOTION FOR DIRECTED VERDICT AS TO THE STATUTE OF LIMITATIONS

A. Bostic's Petition does not meet the standards required for certiorari under Rule 242, SCACR

First, Bostic's argument regarding the denial of its motion for a directed verdict as to the statute of limitations issue fails to satisfy the requirements of certiorari under Rule 242, SCACR. As stated above, Rule 242(b) provides that the circumstances under which a petition can be made are where: i) there is a novel question of law; ii) there is a dissent in the Court of Appeals decision; iii) the decision of the Court of Appeals is in conflict

with the prior decision of the Supreme Court; iv) substantial constitutional issues are involved; and v) a federal question is included in the decision of the Court of Appeals with a decision of the United States Supreme Court. Here, Bostic's arguments as to this issue are merely regurgitations of prior arguments that have been rejected by the trial court, jury, and the Court of Appeals. Indeed, much of their arguments are copied from their briefs to the Court of Appeals verbatim and fail to present any novel issue for review by the Supreme Court. As such, Bostic's petition as to this issue fails to satisfy the standards required for certiorari.

B. Conflicting evidence as to whether the HOA or homeowners had sufficient knowledge of the defects precluded the trial court from finding that the statute of limitations had run as a matter of law

Next, Bostic argues that the evidence in the trial record merits reversal because there is only one reasonable inference that the HOA knew or should have known of the existence of a claim against Bostic as early as 2005.

The South Carolina Court of Appeals properly affirmed the trial court's decision to deny Bostic's motion for a directed verdict as to the issue regarding the statute of limitations. The Court of Appeals properly held that "there is some evidence these latent defects could not have been discovered through the exercise of reasonable diligence until 2009 at the earliest." Opinion No. 5601, at *5. As outlined above, there is conflicting evidence as to whether and when the HOA or homeowners had sufficient knowledge of the defects. This precluded the trial court from finding that the statute of limitations had run as a matter of law. As the Court of Appeals stated in *Burnett v. Family Kingdom, Inc.*, a trial court "must deny a directed verdict motion where the evidence yields more

than one inference or its inference is in doubt.” 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010).

The evidence in the case fully supports the trial court and the Court of Appeals. Section 15–3–535 of the South Carolina Code provides that, “Except as to [medical malpractice actions], all actions initiated under Section 15–3–530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.” S.C. Code Ann. § 5-3-535 (1976). When the evidence is conflicting or is capable of more than one reasonable inference, whether the plaintiff knew or should have known that it had a cause of action is a jury question. *See McAlhany v. Carter*, 415 S.C. 54, 66-67, 781 S.E.2d 105, 112 (Ct. App. 2015), reh'g denied (Jan. 28, 2016). Moreover, a jury must also resolve factual issues when there is a dispute as to whether an owner may have known about certain defects and damages and not others. *Id.*; *see also Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 185, 708 S.E.2d 787, 794 (Ct. App. 2011).

In arguing that the HOA's claims are time-barred as a matter of law, Bostic relies upon testimony at trial that after Bostic abandoned the project in 2004, and during the period when the second developer, IMK, controlled the homeowners' association, two Phase I owners, Steve Taylor and Bob White, reported certain problems with their units to Rick Thoennes (principal of Marick and also IMK). Bostic asserts that the HOA was then charged with Thoennes's knowledge of defects, and such knowledge was sufficient to commence the running of the three-year statute of limitations as a matter of law.

To the contrary, Mr. Thoennes specifically testified that during the operative time, he wore number of hats, including contractor, head of the sales department for IMK, and,

to some degree, a member of the board. Despite a vigorous cross-examination by Bostic's counsel, Mr. Thoennes refused to admit that he communicated information regarding the repairs requested of him to the homeowners' association board while wearing his "contractor's hat." (R. p. 1457, line 23-p. 1458, line 22; R. p. 1459, line 20-p. 1464, line 8). Marick and Mr. Thoennes made repairs as requested and did not report these conditions or requests to the board. (The sum spent by Marick to effect those repairs is not part of the claim of the HOA.) (R. p. 1457, line 23-p. 1458, line 22; R. p. 1459, line 20-p. 1464, line 8).

Regarding the knowledge of the owners requesting those repairs, in addition to the facts set forth above, Mr. White and Mr. Taylor consistently testified that neither of them believed, until 2009, that any of the conditions reported to Mr. Thoennes gave rise to the pursuit of a legal claim. (R. p. 1367, line 25-p. 1368, line 13; R. p. 1345, line 4-p. 1346, line 3). Mr. White and Mr. Taylor also both testified that certain latent deficiencies were not discovered until 2009, when a report of a handrail failure in the unit of owner Jim Logan, revealed severe rot and deterioration behind the stone facade. (R. p. 0606, line 14-p. 0607, line 19; R. p. 1345, line 4-p. 1346, line 3). It was at that point, for the first time, that anyone from the homeowners' association testified that they were aware of the extent of the deficiencies. (R. pp. 0606, line 14-p. 0607, line 19; R. pp. 1345, line 4-p. 1346, line 3). In support of the contention that the owners first learned of the severity of latent deficiencies after discovery of the problem at Logan's unit, at that time the HOA, controlled by the owners for a mere six or seven months, retained the services of an engineering firm, the Warren Group, to investigate what they believed at that point to

be a structural problem at Phase I. This action was commenced on May 29, 2009, just six months after control of the HOA was turned over to the owners.

Further, while there were reports of problems from the early owners of Phase I units before 2009, those problems were addressed by Marick, to the apparent satisfaction of the owners, based upon what they knew at the time. Mr. Taylor testified that while Marick was onsite from 2005 to 2008, he was not aware of defects to deck columns; roofing defects; foundation leaks; problems with the stonework; or problems with the windows. (R. p. 0624, line 13- R. p. 0625, line 14).

He also testified that Marick was responsive to his requests for repairs:

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. 0625, lines 15-25).

Mr. Taylor went on to say that he never reported problems to the HOA while it was controlled by IMK. (R. p. 0626, lines 17-25).

Marick's willingness to address repair requests to the satisfaction of the owners was confirmed by Rick Thoennes, Marick's principal:

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. 1466, lines 3-13).

Finally, Mr. Cox, also on the HOA board but not a contractor, testified that he was unaware of any construction defects when the property was sold. (*See* R. pp. 1424-1425).

All of this testimony, taken in the light most favorable to the Plaintiff, clearly suggests that neither the HOA or the individual owners were aware of systemic and pervasive construction defects, or the severe damages located behind the stone and wood siding in Phase I, or the need to bring suit against Bostic for those problems until the reality of the situation became clear to them in 2009, after turnover of control of the HOA.

In *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989), the Supreme Court ruled on the statute of limitations in a case involving latent defects. In *Santee*, the plaintiff had a cement storage complex installed in 1965

that included twelve concrete silos and three bins. *Id.* at 693. In 1969, a small crack was discovered in one of the bins, which was repaired. *Id.* In 1975, another crack appeared in the same bin. *Id.* at 694. The complex was inspected at this point, and the bin was again repaired at a relatively small cost. *Id.* In 1980, two individuals were killed when a second storage bin collapsed. *Id.* A subsequent investigation revealed that the bin, as well as the twelve silos, were structurally unsound because steel reinforcement rods had been improperly spaced and tied together. *Id.*

The plaintiff brought suit against the general contractor responsible for the construction of the cement plant. The trial court concluded that the plaintiff knew or should have known that it had a cause of action against the contractor when the first crack appeared in 1969, or at least when the second crack appeared in 1975. *Id.* at 695. The South Carolina Supreme Court rejected this conclusion, noting that the plaintiff had introduced expert testimony as to the latency of defects in the silos, noting that the rods were inside concrete walls, and hence undiscoverable. *Id.* at 696. Moreover, there was evidence that repairs were performed. *Id.* The South Carolina Supreme Court concluded that the evidence introduced “went to the reasonableness of [the plaintiff’s] actions, which was an issue to be decided by the jury.” *Id.* (citing *Brown v. Finger*, 240 S.C. 102, 124 S.E.2d 781 (1962)).

More recently, the *Santee* case is cited in support of *Centex Homes v. S. Carolina State Plastering, LLC*, No. 4:08-CV-2495-TLW, 2010 WL 2998519 (D.S.C. July 28, 2010). In *Centex Homes*, Judge Wooten held that although the question was close, the record contained questions of material fact regarding when Centex should have known, through the exercise of reasonable diligence, that a cause of action existed against several

of its subcontractors for alleged construction defects associated with a condominium complex. *Id.* On June 20, 2001, Building 3 was the first building to be completed at the condominium complex, and Building 1 was completed on April 29, 2002. In 2002, Centex discovered water damage to Building 3, which was thought to have been caused by water intrusion at the intersection of the deck and outside walls. Two subcontractors participated in repairs performed in 2002 to address the damage, which included the installation of kickout flashing at the intersections. Centex did not add the kickout flashing to Building 1, which was a similar building. In 2006 Centex discovered water damage in Building 3 and in Building 1. Again it was thought to be caused, at least in part, by water intrusion at the decks. Between 2006 and 2007 Centex made repairs and filed suit against several subcontractors. The subcontractors moved for summary judgment on the statute of limitations.

Centex argued the water damage to Building 1 could not be attributed in total to the lack of kickout flashing, and that damage to Building 3 continued despite the addition of kickout flashing. Thus, Centex argued there were multiple factual issues: the causes of the damage; the existence of latent defects prevented discovery; and evidence that investigation required certain reassemble steps. The Court held that a conclusion that Centex was barred from bringing an action to recover for water intrusion damage that was discovered in 2006 because it did not take steps to insure the kickout flashing was properly installed in 2002 would require the court to infer that the damage could have been prevented if the flashing had been properly installed, which it found was a jury question. *Id.* at *7. The Court found that the determination of whether Centex, through

the exercise of reasonable diligence, should have discovered these alleged deficiencies prior to 2006 was an issue properly resolved by the finder-of-fact. *Id.* at *8.

In this case, at most, a question of fact existed as to when the HOA, through Thoennes or the individual owners, was on notice of defects sufficient to commence the statute of limitations. Another question of fact existed as to which, if any, of the defects and damages for which the HOA asserted claims may have been known or could have been known to the HOA more than three years prior to the filing of the lawsuit. Because of the questions of fact, the trial court properly denied Bostic's motion since it could not rule, as a matter of law, that the statute of limitations had expired more than three years before the claim was filed. *See Law*, 368 S.C. at 434–35, 629 S.E.2d at 645. (stating this court will reverse the circuit court's ruling on a directed verdict or JNOV motion only “when there is no evidence to support the ruling or where the ruling is controlled by an error of law”). Further, Bostic failed to submit the question of when the HOA knew or should have known of a claim to the jury and has thereby waived any right to have the issue determined by the trier of fact. The questions of fact clearly preclude a finding on that issue as a matter of law.

C. The limitations should be equitably tolled since the homeowners were not in control of the HOA until September 2008

Finally, Bostic asks the Supreme Court to decide the issue of equitable tolling of the Statute of limitations. On review, the South Carolina Court of Appeals declined to entertain the issue regarding the equitable tolling of the statute of limitations. The court reasoned that it had made a judgment as to the statute of limitations, which was that the time had not run on Plaintiff-Respondents' claim, so the issue of equitable tolling did not need to be addressed. Opinion No. 5601, at *6 (*citing Futch v. McAllister Towing of*

Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (where the Supreme Court held that the appellate court does not need to address an issue where disposition of a prior issue is dispositive). This was a proper result.

However, since Bostic has raised the issue, if the Supreme Court desires to consider it, Bostic's primary argument is that the Plaintiffs-Respondents were on notice of defects at Stoneledge as early as 2005. Regardless of the level of notice, the limitations period should be equitably tolled since these owners were not in control of the association until September 2008. Bostic argues that equitable tolling only applies in a situation where a defendant has directly done something to give rise to the tolling. Since there is no evidence that Bostic controlled the HOA board during the operative timeframe (indeed the HOA did not exist until well after Bostic left the site), Bostic argues that equitable tolling does not apply to the statute of limitations relating to the HOA's claims against it. That, however, is a misreading of equitable tolling. The fact that the owners had no right to control the affairs of the HOA, or file suit on its behalf, until at least September 2008, is sufficient reason to support the trial judge's finding that the statute was tolled until developers transferred control to the homeowners. The evidence from trial indicates clearly that the owners, once in control, acted with dispatch and comported with any applicable standard of due diligence.

Bostic essentially argues that the statute of limitations began to run as to the HOA upon its creation in November 2005. At that time, Bostic argues, any defect known by the developers was chargeable to the HOA for purposes of the statute of limitations, meaning that the second developer, IMK, let the statute of limitations all but expire, thus precluding the claims of the owners who now control the HOA. This is so, Bostic argues,

notwithstanding the fact that the owners who now control the HOA had no ability to assert those claims until September of 2008, and acted with clear dispatch and due diligence upon assuming control of the HOA at that time.

The result urged by Bostic is anathema to the public policy of South Carolina, as established through its construction defect law, which clearly seeks to protect owners of residential units from defective construction and shady developers and contractors, and ensures that they are armed them with the rights necessary to protect themselves.

Unlike typical corporations, homeowners associations are unique and are treated as unique by the courts. Prior to the turnover of control, the homeowners of a condominium or townhome development are without the right or ability to control the affairs of the HOA, and do not have the ability to bring suit on its behalf. Thus, the homeowners are in a precarious position wherein they have financial responsibility for the obligations of the HOA, but no way to protect themselves in relation to the operation of the HOA. For that reason, the courts of South Carolina have protected homeowners from harmful conduct and conditions that result when a developer fails to properly manage the affairs of the HOA by imposing fiduciary obligations upon developers, including requirements that common areas be in good condition at the time of turnover. The same concerns have also given rise to the elimination of privity as a defense, as well as the development of warranties implied in law for the sale of residential units and for the quality of construction. *See Kennedy v. Columbia*, 299 S.C. 335, 384 S.E.2d 730 (S.C. 1989) (providing a thorough discussion of the history of South Carolina's considerable judicial efforts to "expand our rules to provide the innocent buyer with protection.") *Id.* at 736.

There is no authority supporting Bostic's position that the law of South Carolina imposes on owners of residential units, who are responsible for the funding and operation of a homeowners association, constructive knowledge of defects that may have been acquired by an adversarial developer over a period of years prior to turnover of control. As noted, such a concept is repugnant to South Carolina's policy to provide protection of innocent buyers.

There is authority, however, which provides that the court has the equitable power to toll the statute to prevent a gross injustice like the one Bostic seeks. As noted by the Court of Appeals in *Magnolia North v Heritage Communities*, 397 S.C. 348, 725 S.E. 2d 112 (Ct. App 2012): "The equitable power of the court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies." *Id.* at 125.

It would be manifestly unfair to rule that the statute of limitations began to run years before the owners assumed control of the association — during which time the board was controlled by IMK, whose interests were actually adverse to the owners who comprise the current board. The trial court, applying the equitable power it possessed, correctly held that the statute of limitations did not begin to run before these owners were given control of the HOA. This suit was filed less than a year after turnover and is not time-barred.

CONCLUSION

For the reasons set forth above, Respondents respectfully request this Court to deny the Appellant, Bostic's Petition for Certiorari.

Signature Block to Follow

Respectfully submitted,

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February 11, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
FEB 13 2019
SC Court of Appeals

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

Of Which Bostic Brothers Construction, Inc. is the Respondent-Petitioner.

PROOF OF SERVICE

I certify that I have served the Petitioners-Respondents' Return to Respondent-Petitioner's Petition for Writ of Certiorari on counsel for the Respondent-Petitioner 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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February 11, 2019

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RECEIVED
FEB 13 2019
SC Court of Appeals

Re: *Stoneledge at Lake Keowee Owners' Association, Inc., et al.*
vs. IMK Development Co., et al. (Bostic Brothers Construction, Inc.)
Appellate Case No. 2019-000041

Dear Mr. Shearouse:

Regarding the above-referenced matter, enclosed for filing please find the original and six (6) copies of Petitioners-Respondents' Return to Respondent-Petitioner's Petition for Writ of Certiorari and an original Proof of Service.

Thank you, and with kindest regards, I remain

Very truly yours,

LYLES & ASSOCIATES, LLC

Robert T. Lyles by/ Marcia J. Sullivan

Robert T. Lyles, Jr.

RTL/cw

Enclosures

cc: Clerk, South Carolina Court of Appeals
Alan R. Belcher, Jr., Esquire

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FIRST CLASS MAIL

V. Claire Allen, Deputy Clerk
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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FEB 13 2019

SC Court of Appeals