

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
IN THE COURT OF COMMON PLEAS
The Honorable Alexander S. Macaulay, Circuit Court Judge
AND FROM THE OPINION OF THE COURT OF APPEALS
Opinion No. 5601 (--- S.E.2d ----2018 WL 4905772)
Filed October 10, 2018

AND FROM THE SOUTH CAROLINA COURT OF APPEALS
Order Denying Petition for Rehearing
Filed December 13, 2018

Stoneledge at Lake Keowee Owners' Association, Inc., C. Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, and Robert White, Individually, and on Behalf of All others similarly situated, Petitioner-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 Whom Bostic Brothers Construction, Inc. is the Respondent-Petitioner

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

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February 26, 2019

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S.C. SUPREME COURT

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STATEMENT OF THE CASE

Respondent-Petitioner Bostic Brothers Construction, Inc. (hereinafter “Bostic”) filed its Petition for Writ of Certiorari to the Supreme Court on January 11, 2019.¹ Petitioner-Respondent Stoneledge at Lake Keowee Owners’ Association Inc. (hereinafter “Stoneledge”) filed a Return on February 11, 2019. In the Return, Stoneledge attempts to dissuade this Court from granting Bostic’s Petition for Writ of Certiorari because, in Stoneledge’s estimation, the Petition fails to meet the procedural and substantive criteria for this Court to accept it, pursuant to Rule 242(b) SCACR. Stoneledge ignores the plain reading of the Rule that makes it clear that this Court has broad discretion to grant Bostic’s Petition for Writ of Certiorari.

There are several reasons why the South Carolina Supreme Court should grant Bostic’s Petition for Writ of Certiorari. First and foremost, Bostic requests that that this Court review the lower appellate court’s opinion and correct a scrivener’s / mathematical error in the Opinion that equates to a difference of \$1 Million (One Million Dollars) in the judgment to be entered against Bostic in the Oconee County Clerk of Court’s Judgment Role.² This Court provides the last forum where Bostic can obtain relief from this mathematical error, before remand to the Oconee County Court of Common Pleas for entry of judgment against it.

Aside from Bostic’s request that this Court correct what Bostic believes to be a mathematical error in the lower appellate court’s opinion, the substantive, legal issues upon

¹ Bostic incorporates the content of its Petition for Writ of Certiorari herein and respectfully requests that this Court grant its Petition for Writ of Certiorari. By way of further procedural background, in response to Stoneledge’s Return, Bostic filed a motion for enlargement of time and extension until February 26, 2019 to file and serve its Reply. On February 25, 2019, this Court granted Bostic’s motion thereby extending the date to file and serve its Reply to February 26, 2019. Bostic files this Reply to Stoneledge’s Return pursuant to Rule 243, SCACR.

² See Stoneledge at Lake Keowee Owners’ Association, Inc., et al. v. Bostic Brothers Construction, Inc., et al. Op. No. 5600 (S.C. Ct. App. Filed Oct. 10, 2018).

which Bostic seeks this Court's clarification are issues that have been the subject of many legal debates for decades in South Carolina and throughout American Jurisprudence. The issues before this Court in Bostic's Petition for Writ of Certiorari concern the application of South Carolina's Contribution Among Joint-Tortfeasors Act (S.C. Code Ann. §15-38-10 (2005), *et seq.*) and the applicable statute of limitations for construction defect litigation. See S.C. Code Ann. §15-3-530 (2005). Should this Court grant Bostic's Petition for Writ of Certiorari, its review of the legal issues that are present in this appeal will provide long-desired guidance to the construction litigation bar in these incredibly advanced legal issues.

ARGUMENTS

I. THE ISSUES RAISED IN BOSTIC'S PETITION ARE SUFFICIENT TO ALLOW THE SUPREME COURT, IN ITS DISCRETION, TO REVIEW THE APPELLATE COURT'S FINAL DECISION REGARDING THE APPLICATION OF SETOFF OF PRIOR SETTLEMENTS AGAINST THE TRIAL COURT'S JURY VERDICT, PURSUANT TO SECTION 15-38-50 OF THE SOUTH CAROLINA CODE (2005).

The Supreme Court of South Carolina has broad discretion in reviewing petitions for certiorari from the lower appellate court. Stoneledge argues in its Return that the Supreme Court's discretion to issue writs of certiorari is somehow limited by Rule 242(b) SCACR. That argument is without merit. Rule 242 (b) SCACR was written to provide a set of enumerated reasons upon which this Court can rely, as it considers writs of certiorari. The rule itself makes it clear that those enumerated reasons are essentially guidelines for this Court to consider when it reviews a petition for certiorari. Nothing in the text of Rule 242(b) SCACR states that those guiding reasons are "requirements" or "prerequisites." Stoneledge's Return fails to include the qualifier provided at the onset of the rule:

Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, *while neither controlling nor fully measuring*

the Supreme Court's discretion or power to grant review in general, indicate the *character* of reasons which will be considered: (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; and (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.

Rule 242, SCACR (emphasis added).

Clearly, as the language sets forth in the rule, the enumerated list is not intended to serve as “requirements” but rather “considerations” that “neither control[] nor fully measur[e] the Supreme Court’s discretion or power to grant review in general.” *Id.* The Supreme Court has the constitutional authority to grant review over any matter in its discretion.

Bostic submits to this Court that its Petition as to the miscalculation of the setoff is not only within the Supreme Court’s purview and discretion to grant certiorari, but it is a “special and important reason” that is crucial to the integrity of our judicial system. Bostic petitions the Supreme Court to rectify a \$1 million error in the calculation of the setoff. This is not a matter of discretion as to how to apply set off, but rather a mathematical mistake that is contrary to the Court of Appeals’ own holding. Moreover, this issue appears to be conceded by Stoneledge in its Return. (Stoneledge Return, p. 10.)

It is also within the Supreme Court’s discretion to amend an application of setoff so that it should only have been applied to the negligence cause of action. See S.C. Code § 15–38–50 and Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989) (distinguishing breach of implied warranty from a tort claim).

In Stoneledge’s Return, Stoneledge argues its position on the allocation of a portion of the judgment against Bostic. Bostic and Stoneledge’s differing arguments as to the precise holding as to a judgment against Bostic furthers Bostic’s petition to this Court. Bostic requests

that this Court exercise its judicial discretion and provide clarification, since the Court of Appeals Opinion No. 5600 is silent as to a judgment against Bostic, specifically.

II. THE ISSUES RAISED IN BOSTIC'S PETITION ARE SUFFICIENT TO ALLOW THE SUPREME COURT, IN ITS DISCRETION, TO REVIEW THE APPELLATE COURT'S HOLDING AS TO THE APPLICABLE STATUTE OF LIMITATIONS PURSUANT TO SECTION 15-5-530 OF THE SOUTH CAROLINA CODE.

Stoneledge argues in its Return that Bostic's Petition fails to satisfy Rule 242, again premised upon the argument that Rule 242 enumerates prerequisites rather than "considerations". As provided in Rule 242, SCACR cited above, the enumerated list is not intended to serve as "requirements" but rather "considerations" that "neither control[] nor fully measur[e] the Supreme Court's discretion or power to grant review in general." *Id.* The Supreme Court has the power to grant review over any matter in its discretion.

Stoneledge mischaracterizes Bostic's Petition as resubmitting its arguments which were on appeal. However, Bostic raises new issues in its petition which arise from the Court of Appeal's ruling that Bostic contends are "special and important" and require the Supreme Court's review. Bostic submits to this Court that granting certiorari in this matter is in the Court's discretion and the Court of Appeals erred by misapplying a prior decision of the Supreme Court. Moreover, the Court of Appeals' decision results in a new standard that would greatly impact construction defect litigation and therefore requires the Supreme Court's review.

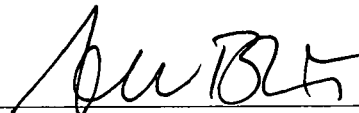
The Court of Appeals misapplied the discovery rule as it was used in Santee Portland Cement Co. v. Daniel Int'l Corp. by finding cracks in concrete to be tantamount to water intrusion through a building envelope, when evaluating the sufficiency of notice of defects. 299 S.C. 269, 384 S.E.2d 693 (1989), *overruled on other grounds.*

Additionally, the Court of Appeal's ruling tolls the statute of limitations for a plaintiff who obtains a repair from a third party until such a time as the repair fails. This is not how the discovery rule operates as set forth in Barr v. City of Rock Hill and should not be the new standard for the discovery rule to commence the statute of limitations. See id. At 330 S.C. 640, 500 S.E.2d 157 (S.C. Ct. App. 1998). The concept that Stoneledge may have acted with due diligence by making repairs should not negate the fact that Stoneledge was at that time on notice of a claim against Bostic. See Allwin v. Russ Cooper Assocs., Inc., Op. No. 5617 (S.C. Ct. App. Filed Jan. 16, 2019) (finding plaintiff's history of due diligence with repairs and maintenance does not negate the fact that plaintiff was on notice her claim).³

CONCLUSION

In conclusion, Bostic respectfully requests this Honorable Court grant its petition for writ of certiorari.

Respectfully submitted,



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³ This 2019 decision is not yet final.

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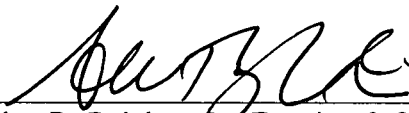
Defendants.

Of Whom Bostic Brothers Construction, Inc. is the
Petitioner.

PROOF OF SERVICE

I certify that I have served Respondent-Petitioner's Reply to Petitioner-Respondent's Response to Respondent-Petitioner's Petition for Writ of Certiorari upon the Petitioner-Respondent by way of U.S. Mail, stamped First Class delivery, on January 25, 2018, addressed to Respondents' attorneys of record, addressed as follows:

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