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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, 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.

Appellate Case No. 2019-000041

BRIEF OF PETITIONERS-RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

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

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

STATEMENT OF THE CASE

Stoneledge at Lake Keowee Owners' Association, Inc. ("Plaintiff" or "HOA") filed civil action 2009-CP-37-0652, which arose out of the development and construction of a community on Lake Keowee in Oconee County (the "Project" or "Stoneledge"). In 2002, Bostic Brothers Construction, Inc. ("Bostic") began construction as the original general contractor of the Project and as an owner of the initial development company. (R. p. 0926, lines 15-22). In 2005, Marick Home Builders, LLC ("Marick") took over construction of the Project, which was purchased by IMK Development Company (IMK). IMK was comprised of Marick and Integrys Keowee Development LLC ("IK"). Rick Thoennes ("Thoennes") was the license holder and principal of Marick. (R. p. 01355, lines 23-25). In addition, Thoennes played multiple other roles in the Project, which included acting as developer and, along with William Cox, serving on the Stoneledge Board of Directors ("Board") until the Project was turned over to the homeowners. The principals of IK included William Cox and Larry Lollis. The HOA amended its complaint to add Bostic on February 9, 2010. The HOA alleged claims including negligence, breach of warranty, and breach of fiduciary duty against entities and individuals involved in the Project including Bostic, IMK, Marick, Rick Thoennes, William Cox, Larry Lollis.

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. (R. pp. 21-28). The trial court entered the Separate Trial Order based on arguments including Bostic was not involved in Phase II; different codes and even different law applied to the two phases; and separate trials would prevent undue prejudice to certain subcontractors who performed work solely on one phase or the other.

The HOA settled with some defendants, but proceeded to trial on October 28, 2013, on the Phase I claims only against Bostic, IMK, Marick, Thoennes, Cox and Lollis. Plaintiff's expert Derek Hodgin, P.E. provided expert testimony about the various construction defects at the Project and outlined a scope for repairs. 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. (R. p. 1653-54).

On November 8, 2013, the jury returned a verdict in favor of the Plaintiff in the amount of $5,000,000 on three causes of action: negligence against Bostic and Marick ($3,000,000.00), breach of warranty of service against Bostic and Marick ($1,000,000.00), and breach of fiduciary duty against IMK Development Co., Integrys Keowee Development, Rick Thoennes, William Cox and Larry Lollis ($1,000,000.00). (R. pp. 29-35).

Immediately after the jury rendered its verdict, 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 ruled the award was cumulative:

> 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). No Defendant objected to that ruling or requested that an inquiry be made of the jury on that issue while the jury was empaneled. Instead, the defendants proceeded to argue their positions with respect to apportionment. At the defendants' request, 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. (R. p. 36). Once the jury decided that issue, the jurors were released with the consent of the defendants. (R. p. 01979-01998).

Plaintiff filed a Motion to Alter or Amend (Motion for Entry of Judgment) seeking to have the full amount of the cumulative 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). Defendants did not object to the settlements or amount of the settlements.

Judge Macaulay presided over a hearing on all post-trial motions on April 10, 2014. (R. pp. 2076-2185). As requested in Plaintiff's Motion to Alter or Amend (Motion for Entry of Judgment) and letter dated November 25, 2013, the trial court entered a Form 4 Judgment filed January 30, 2015, amending its prior Form 4 Judgment filed November 8, 2013, and applying a set-off for the amounts recovered by the Plaintiff from the settling defendants. (R. pp. 41-43). As to the negligence cause of action, the trial court entered judgment of $2,144,088.23 against Bostic.[1] As to the breach of warranty cause of action, the court entered judgment of $643,226.47 against Bostic (30% of $2,144,088.23).[2]

[1] The amount of the judgment against Bostic was not reduced based on S.C. Code § 15-38-15 because the jury determined Bostic was more than 50% at fault on the negligence claim. As to Plaintiff's claim for negligence against Marick, the court entered judgment of 857,635.29.

[2] As to Plaintiff's breach of warranty claim against Marick, the court entered judgment of 2,144,088.23.

Bostic and Marick/Thoennes filed separate appeals. The Court of Appeals issued opinions in both on the same day. In this appellate case, the Bostic 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. 5601 (S.C. Ct. App. filed October 10, 2018) (App. Ex. M), which incorporates *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) (App. Ex. N). Bostic (as did Marick) filed its Petition for Rehearing. (App. Ex. P). The HOA also filed petitions for rehearing in both appeals. (App. Ex. O). The Court of Appeals denied the parties' respective Petitions for Rehearing by Order dated December 13, 2018. (App. Ex. Q). Bostic filed a petition for writ of certiorari for review by this Court. The HOA filed a cross-petition for writ of certiorari. By Order dated August 6, 2019, both petitions were granted.

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. 511). The Project was developed in two phases. Phase I consists of eight (8) buildings representing thirty-seven (37) individual units. (R. p. 868). 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 numerous units in Phase I, and several units were in various stages of completion when Bostic ceased construction and ultimately entered into bankruptcy. (R. p. 0615, lines 5-10; R. p. 0708, lines 1-9; R. p. 0759, line 12-p. 0760, line 11; R. p. 1452).

After Bostic left the project, on or about March 30, 2005, Keowee Townhouses, LLC sold the Project, including unfinished units in Phase 1, to Defendant IMK, a company comprised of defendants Marick and IK (Integrys Keowee Development). (R. pp. 0634-0635). The members of

IMK were Marick and Integrys Keowee Development LLC ("IK"). (R. p. 1438, lines 3-8; R. p. 1382). IK's owners were William Cox, Tim Roberson and Larry Lollis. (R. p. 1381-1382). Rick Thoennes, William Cox, and Tim Roberson were members of the HOA Board. (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. 1402; R. p. 2271).

Marick and its license holder Thoennes, assuming the role of general contractor, obtained 26 new building permits, and began work on Phase I in 2005. (R. p. 757-758; R. 791-798). Thoennes specifically testified that during the operative time, he was wearing a number of hats, including that of contractor, head of the sales department for IMK, and, to some degree, a member of the board. (R. p.1461-62).

Plaintiff's expert Derek Hodgin provided expert testimony about the various construction defects at the Project. (R. p. 820-1082). Hodgin developed a scope of repair for the defects and damages he discovered in Phase I, and Plaintiff presented evidence of the cost to repair (including past repairs and future costs) totaling $6,309,197.00. 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 based on Hodgin's scope of work. (R. p. 1942-1946).

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's expert, Richard ("Rick") Moore, P.E., admitted that the Project had pervasive water infiltration, rot and deterioration resulting from the contractor's failure to properly construct the Project. (R. p. 1738-1757). Bostic's expert Steven (J.R.) 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 agreed 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. 1783; R. p. 1792-93; R. pp. 1804-1805). 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. 924-p. 927; R. p. 0932-933). Marick did not offer expert testimony on any subject in the Phase I trial.

At the close of the Phase I trial, the remaining defendants were Bostic, IMK, IK, Marick, Thoennes, Cox and Lollis.

ARGUMENT

In this case, the Plaintiff HOA sought recovery of one single damage, which was the cost to repair the Phase I buildings. The jury determined that the damage was $5,000,000, which was less than the total cost of repair claimed by Plaintiff and greater than the repair cost of the defense expert. That single damage, the cost to repair, was the measure of damages for each of the causes of action Plaintiff asserted against all of the Defendants. Despite the form of the jury verdict, the trial judge knew and understood the HOA had claimed and proven only one damage, which is why, the Court of Appeals noted, he held that the jury verdict was a "cumulative award." The Court of Appeals correctly held Defendants failed to challenge this finding or request that the court question the jury and therefore cannot oppose the finding on appeal:

> ...The trial court ruled that the damages the jury awarded for each of the causes of action would be added together, and that the HOA was entitled to damages for each of those causes of action. Marick failed to object to the court's decision or request the court ask the jury what its intent was in how it awarded damages. Accordingly, Marick is unable to argue on appeal the court's decision was in error.

Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC, Opinion No. 5600, 425 S.C. 276, 301, 821 S.E.2d 509, 522 (Ct. App. 2018). (App. Exhibit N).

Despite acknowledging the cumulative nature of the award, the Court of Appeals made two mistakes. First, it disregarded the trial court's post-trial amendment of the verdict, which applied the entire verdict to each of the three causes of action and accurately reflected a single damage and a cumulative verdict. In disregarding the judgment entered by the trial court, the Court of Appeals arbitrarily allocated the verdict as specific damages for specific causes of action. Second, the Court of Appeals then applied settlement sums to only a portion of the damages award, which was improper because application of the set-off should have remained at the discretion of the trial judge. This portion of the Court of Appeals' analysis is in error for the reasons below.

I. The Court of Appeals should have affirmed the cumulative verdict of a single damage.

After acknowledging the damages award was cumulative and agreeing the defendants failed to preserve an objection to that finding, the Court of Appeals held that the single, cumulative damages award of $5,000,000 should be allocated among the causes of action. This determination was contrary to the finding and was also error because there was no evidence that would support a finding of particularized damages for the individual causes of action. There was no evidence that the Plaintiff HOA suffered distinct damages proximately caused by negligence and others proximately caused by a breach of warranty and other particular damages caused by a breach of fiduciary duty. As the trial judge and the Court of Appeals noted, Plaintiff HOA suffered only one damage, which was the measure of damage for each cause of action and what led to the trial judge's finding that the jury's award was cumulative and his post-trial amendment of the verdict form.

Importantly, the finding that the verdict was cumulative and the post-trial amendment of the verdict did not usurp the authority of the jury or change the jury's verdict. The trial judge simply applied the jury's findings, based upon his extensive observation of the trial and the evidence presented, and correctly applied the jury's verdict —$5,000,000 — as the cumulative award for a

single damage, regardless of the cause of action. *See Howard v. Kirton*, 144 S.C. 89, 142 S.E. 39, 43 (1928). ("It was the duty of the trial judge to decide what the verdict meant, and, in reaching his conclusion thereabout, it was his duty to take into consideration not only the language of the verdict, but all the matters that occurred in the course of the trial."); *see also Keeter v. Alpine Towers Int'l, Inc.*, No. 2012-UP-692, 2012 WL 11867308, at *10 (S.C. Ct. App. June 27, 2012).[3]

There was no clear error in this instance and the trial judge's post-trial amendment of the verdict form to properly reflect the law of the case — a cumulative award for one damage — should not have been reversed. The Court of Appeals, not the trial court, assigned portions of the damages to distinct causes of action, despite the lack of any evidence to support that assignment.

II. The trial court's determination of the set-off was appropriate and should not have been disregarded by the Court of Appeals.

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

a. The Court of Appeals should have applied the set-off to the entire verdict.

It is the law of the case that the damages awarded by the jury were "cumulative," and it is undisputed that all of the damages arose out of the same factual scenario. As noted, there was no evidence that the damages were anything other than the cost to repair and no evidence that there

[3] The *Keeter v. Alpine Towers* case was a published opinion at the time of the Phase I trial and was argued to the trial court. The cite to the published opinion was *Keeter v. Alpine Towers Int'l, Inc.*, 399 S.C. 179, 730 S.E.2d 890 (Ct. App. 2012). Subsequently, the parties to that appeal submitted a joint motion to dismiss the petition for review to the South Carolina Supreme Court. The Supreme Court granted the joint motion to dismiss and directed the Court of Appeals to depublish its opinion. *Keeter v. Alpine Towers Int'l, Inc.*, 399 S.C. 179, 730 S.E.2d 890 (Ct. App. 2012), superseded, No. 2012-UP-692, 2012 WL 11867308 (S.C. Ct. App. June 27, 2012), and opinion ordered depublished, 410 S.C. 445, 766 S.E.2d 375 (2014).

were particular damages associated with any of the particular causes of action. The measure of damages for each cause of action is precisely the same —the cost to repair.[4]

The law of set-off is clear and is articulated by the Court of Appeals in *Smith v. Widener*, 397 S.C. 468, 724 S.E. 2d 188 (Ct. App. 2012). Like *Smith*, although the Plaintiff HOA in this case may have "stated that claim in various causes of action," the injury it suffered as a result of the tortious conduct of all defendants was the same. *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012). Although the South Carolina Contribution Among Tortfeasors Act addresses the right to set off, the right existed prior to the Act as part of the common law. *See Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 219, 528 S.E.2d 682, 688 (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)). The trial court properly exercised its discretion in its application of the set-off.

b. There were no separate damages for breach of fiduciary duty.

In stating its opinion as to application of the set-off, the Court of Appeals states in its opinion: "Thoennes' fiduciary duty to the HOA was the result of his position on the Board of the HOA." Although Thoennes was on the Board of the HOA, his position on the Board was a result of his involvement as a developer, and as supported by the evidence at trial, Thoennes acted as a developer. Thoennes' duty as a developer is set forth in Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp., 349 S.C. 251, 260, 562 S.E.2d 633, 638 (2002), as discussed in the portion of the Court of Appeals' Opinion 5600 relevant to jury charges. (App. Ex. N). The measure of

[4] The cost of repair was also the measure of damages for the Breach of Fiduciary Duty cause of action. *See Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 375, 725 S.E.2d 112, 127 (Ct. App. 2012).

damages for breach of fiduciary duty by the developer was the cost of repair. It is the HOA's position that the set-off should be applied to the damage, which as set forth above, is the same for each cause of action. All of the settlements prior to trial were applicable to the same damage — the cost of repair. However, to the extent the Court of Appeals' decision is based on its review of the record and determination that none of the settlement proceeds should be set applied to the amount it allocated to the breach of fiduciary cause of action because no board member settled with the HOA prior to trial, it is in error. The settlements prior to the Phase I trial did include developers with potential liability for a breach of fiduciary cause of action. (R. pp. 2757-2759). The settlements also included subcontractors, an architect and individuals, all with potential liability to the HOA for the same damage — the HOA's cost to repair.

c. If this Court determines the cumulative verdict is to be reallocated, then the set-off should be allocated as below.

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

Bostic: Negligence (100%) — $1,286,452.94

Breach of Warranty (30%) — $128,645.30

Total: $1,415,098.24

Marick: Negligence (40%) — $514,581.17

Breach of Warranty (100%) — $428,817.65

Total: $943,398.82

Thoennes: Breach of Fiduciary Duty — $428,817.65

CONCLUSION

For the reasons set forth above, Petitioner-Respondents respectfully request that this Court reinstate the verdict and application of set-off as determined by the trial judge. If the verdict is to be artificially re-allocated as the Court of Appeals determined, which Plaintiff HOA believes is not proper, the set-off should be applied to the entire verdict for one damage including any amounts re-allocated to the breach of fiduciary cause of action.

Respectfully submitted,

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September 9, 2019

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PROOF OF SERVICE

I certify that I have served the Brief of Petitioners-Respondents on counsel for the Respondent-Petitioner by depositing a copy in the United States Mail, First Class postage prepaid, this 9th day of September 2019, addressed to the following:

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