THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
The Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2019-000041
Lower Court Case No. 2009-CP-37-00652

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*.

BRIEF OF RESPONDENT-PETITIONER

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the Court of Appeals err in its calculation of the setoff resulting in a $1 Million discrepancy in the apportionment of damages?
2. Did the Court of Appeals err in applying the settled tortfeasors' aggregate settlement to offset the $1 million verdict for breach of implied warranties?
3. Did the Court of Appeals err in holding that the homeowners did not appreciate the degree of damage to commence the running of the statute of limitations?
4. Did the Court of Appeals err in affirming the trial court as to the statute of limitations?
5. Did the Court of Appeals err in failing to impute knowledge of board members upon the HOA to commence the statute of limitations?
6. Did the Court of Appeals err in effectively tolling the statute of limitations until such time that the repairs conducted by a third-party failed?

STATEMENT OF THE CASE

On May 29, 2009, Stoneledge at Lake Keowee Owners' Association, Inc. and various individual homeowners initiated this cause of action in the Oconee County Court of Common Pleas, Civil Action No. 2009-CP-37-0652 (the Plaintiffs/Petitioners-Respondents captioned above hereinafter are collectively referred to as "Respondents"). Subsequently, on February 9, 2010, Respondents filed suit against Bostic Brothers Construction, Inc. ("Bostic"). (R. pp. 120-144). Respondents' Third Amended Complaint pled the following causes of action: (1) Breach of Warranty of Developers;[1] (2) Negligence of Developers; (3) Breach of Fiduciary Duty of Developers; (4) Breach of Warranty of Contractors and Subcontractors; (5) Negligence of

[1] "Developers" identified in Respondents' Third Amended Complaint included IMK, Keowee, Ludwig, SDI, Medallion, Integrys, Marick, Bostic, Larry Lollis, William Cox, Bradford Seckinger, John Ludwig, and Rick Thoennes, collectively and individually. (R. p. 170).

Contractors and Subcontractors; (6) Negligence of Miller/Player and Associates ("MPA"); and (7) Breach of Express and Implied Warranty of MPA. (R. pp. 172-178).

On October 28, 2013, a jury trial commenced in Oconee County before the Honorable Alexander S. Macaulay. At trial, Respondents sought damages totaling $6.5 million. During the trial, Defendants Marick and IMK were deemed an amalgamated entity, and treated jointly for purposes of trial (hereinafter collectively, "Marick"). At the close of Respondents' case, Bostic moved for a directed verdict as to the statute of limitations, which was denied. (R. p. 1526, line 7 - p. 1547, line 10; p. 1594, line 4 - p. 1595, line 5). Bostic renewed its motion for directed verdict at the close of Defendants' case, which was also denied. (R. p. 1844, line 8 - p. 1849, line 3). On November 7, 2013, the jury returned the following $5 Million verdict (R. pp. 33-35):

- $3 million for negligence against Marick and Bostic;
- $1 million for breach of implied warranties against Marick and Bostic; and
- $1 million for breach of fiduciary duty against Defendants IMK, Integrys, Rick Thoermes, Larry D. Lollis, and William C. Cox, individually.

The jury allocated 60% of the negligence award to Bostic and 40% to Marick and allocated 30% of the breach of implied warranties award to Bostic and 70% to Marick. (R. p. 36). The trial court applied a setoff of $2,855,911.77 to the entire $5 million verdict, entering judgment for $2,144,088.23; and in the instances of breach of implied warranties and negligence, the trial court reduced the $2,144,088.23 by the percentage of apportionment. (R. pp. 284-292). The trial court entered the entire amount of the judgment as to Bostic.

On November 18, 2013, Bostic timely filed four Post-Trial Motions: (1) a Rule 50, SCRCP Motion for Judgment Notwithstanding the Verdict, arguing that the Court erred in failing to grant Bostic's Motion for Directed Verdict at trial based upon the applicable statute of limitations; (2) a Motion requesting an Order granting a setoff of all funds recovered pre-trial by

Respondents; (3) a Motion pursuant to Rule 59, SCRCP requesting a new trial absolute; and (4) a Motion pursuant to Rule 59, SCRCP requesting a new trial nisi remittitur.

On January 22, 2015, the trial court entered an Order Denying Defendants' Post-Trial Motions. (R. p. 18). On February 19, 2015, Bostic timely filed a Rule 59(e), SCRCP Motion to Alter or Amend Judgment and asked the trial court to reconsider its post-trial Order entered in the case because the Order did not specifically address Bostic's Post-Trial Motions; i.e., Motion for New Trial Absolute, Motion for New Trial Nisi Remittitur, Motion for Judgment Notwithstanding the Verdict and Motion for Set-Off. (R. pp. 2188-2191). On March 13, 2015, the trial court denied the Motion. (R. pp. 3-4).

On March 3, 2015 and March 20, 2015, Bostic timely filed its Notice of Appeal and Second Amended Notice of Appeal. On December 7, 2017, oral arguments were held before the South Carolina Court of Appeals. On October 10, 2018, the Court of Appeals filed Opinion No. 5601 (termed "Stoneledge II" by the Court of Appeals), which forms the basis of this review brief.[2] On November 21, 2018 Bostic filed a Petition for Rehearing, which was denied by the Court of Appeals on December 13, 2018. (App. Ex. Q). On January 14, 2019, Bostic filed a petition for Writ of Certiorari for review by this Court. On February 4, 2019, Respondents filed a cross-petition for Writ of Certiorari. This Honorable Court, by Order dated August 6, 2019, granted both Petitions.

STATEMENT OF FACTS

This construction defect lawsuit emanated from a multi-family townhome project located on Lake Keowee in Oconee County, South Carolina, which consisted of multiple phases of development ("the Project"). Bostic was the initial general contractor of record and obtained

[2] Both Opinion No. 5601 ("Stoneledge II") and Opinion No. 5600 ("Stoneledge I") were filed on October 10, 2018. The Court of Appeals' Opinion in the instant matter, Op. No. 5601, incorporates by reference Op. No. 5600: "Our opinion in Stoneledge I adequately addresses the second and third issues Bostic raises in this appeal."

building permits to construct the first thirty-seven units as part and parcel of Phase I of the Project in August 2002. (R. p. 1467, line 5; pp. 2365-2406). Bostic's principals, Jeff and Joe Bostic, had ownership interests in Defendant Keowee Townhouses, LLC, which operated as the developer of the Project. (R. p. 926, lines 15-22). After starting the Project and completing construction of approximately twelve units, Bostic entered into bankruptcy proceedings. (R. p. 708, lines 1-9).

On the brink of foreclosure, Keowee Townhouses, LLC sold the remaining, partially completed twenty-five units in Phase I of the Project. These partially completed units were sold to Defendant IMK Development Co., LLC ("IMK"), a development company comprised of Defendants Marick Home Builders, LLC ("Marick"), and Integrys Holdings, LLC ("Integrys"). (R. p. 1420, lines 6-16). At a considerable discount, the sale was completed on March 30, 2005. At the time IMK purchased the units, Rick Thoennes was the license holder and managing member for Marick. (R. p. 1431, lines 23-25). Shortly thereafter, Marick assumed the role of general contractor, obtained new building permits on the twenty-five partially completed units, and in 2005 began work on the Project. (R. p. 1438, lines 3-8). At that time, Rick Thoennes assigned Nathan Hornaday as the superintendent for the Project. (R. p. 756, lines 7-14).

In mid-2005, after assuming control of the Project. Marick created a homeowner's association named Stoneledge at Lake Keowee Owners' Association, Inc. (the "HOA"), established bylaws, and elected HOA board members including Rick Thoennes, William Cox, and Tim Roberson. (R. p. 508, line 23 - p. 509, line 8). Marick remained in control of the HOA until September 2008. (R. p. 604, lines 9-21). In September 2008, Marick transferred control of the HOA to the individual homeowners. (R. p. 604, lines 9-14). Neither Bostic nor Defendant Keowee Townhouses, LLC had any active involvement in the HOA.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN ITS APPLICATION AND CALCULATION OF SETOFF IN CONTRADICTION TO SOUTH CAROLINA LAW

The Supreme Court has discretion to amend an application of a setoff. Here, the setoff should have only been applied to Respondent's negligence cause of action. See S.C. Code Ann. § 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). Bostic requests this Honorable 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.

A. In Holding that a $2.85 Million Setoff Applied to a $4 Million Award Leaves a $2.15 Million Judgment the Court of Appeals Either Miscalculated or Committed a Scrivener's Error

The jury in this matter returned a verdict of: $3 million for Negligence as to Bostic and Marick; $1 million for Breach of Implied Warranty as to Bostic and Marick; and $1 million for Breach of Fiduciary Duty as to Defendants IMK, Integrys, Rick Theonnes, Larry D. Lollis, and William C. Cox, individually.

In Opinion No. 5600, the Court of Appeals ruled that Defendant Thoennes is responsible for the $1 million award for breach of fiduciary duty, subject to any claims he may have for contribution from any other defendants.[3] The Court deducted the value of the settlements and found that "this would leave a $2,144,088.23 judgment to allocate between the negligence and breach of implied warranty causes of action." The difference between the setoff of $2,855,911.77 and the remaining verdict of $4,000,000.00 is $1,144,088.23, not $2,144,088.23, as held by the Court of Appeals:

[3] The Court of Appeals correctly held the $1 million award against Mr. Thoennes for breach of fiduciary duty is not subject to a setoff from settling tortfeasors. Therefore, the Court of Appeals found the remaining $4 million verdict (representing the negligence and breach of implied warranty awards) should be setoff by the amount of the prior settlements, which total $2,855,911.77.

$4,000,000.00
-$2,855,911.77
$1,144,088.23

Thus, using the correct remaining amount of $1,144,088.23 coupled with the allocation as set forth by the Court of Appeals in its Opinion, the following figures would apply:

> Because the jury awarded $3 million to the negligence cause of action and $1 million to the breach of implied warranty cause of action, we believe it would be proper to allocate three-fourths of the remaining judgment to the negligence cause of action and the remaining one-fourth to the breach of implied warranty cause of action. This allocation would mean **[$858,066.17]** would be allocated to the negligence cause of action and **[$286,022.06]** would be allocated to the breach of implied warranty cause of action.

Using the corrected figure, the Court of Appeals' analysis would continue by applying the jury's apportionment of fault as follows (60% to Bostic on the negligence claim, 40% to Marick on the negligence claim, and 30% to Bostic on the breach of implied warranty claim, 70% to Marick on the breach of implied warranty claim):

Bostic:	$514,839.70 Negligence
	$85,806.62 Breach of Implied Warranty
Marick:	$343,226.47 Negligence
	$200,215.44 Breach of Implied Warranty
Thoennes:	$1 million Breach of Fiduciary Duty

Bostic respectfully requests this Honorable Court reverse the Court of Appeals and remand this matter to the trial court with instructions to correct the miscalculation as set forth above.

B. The Court of Appeals Erred in Holding that the Setoff Applied to Breach of Warranty Claims

The Court of Appeals should have held that only the negligence award of $3 million is subject to a setoff of $2,855,911.77, representing the amount of recovery Respondents received from various settling tortfeasor-Defendants prior to entry of judgment. The Court of Appeals should not have applied the setoff to reduce Respondents' awards for breach of implied warranty and breach of fiduciary duty.

"[W]hen a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law." Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). However, when the settlement involves compensation for an injury different from the one tried to verdict, there is no setoff as a matter of law. Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct. App. 1998). When the settlement "is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between the two claims." Smith, 397 S.C. at 473, 724 S.E.2d at 191.

This Court held in Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989) that breach of implied warranty claims are not tort claims. Here, however, the Court of Appeals ostensibly meant to apply the setoff to the entire $4 million judgment, which includes a $1 million award for breach of implied warranties against Bostic and Marick (although contrary to its holding, it appears the Court of Appeals applied the setoff to the entire $5 million figure which includes all three awards as discussed above). Because a cause of action for breach of implied warranties is an action in contract - and not in tort - no portion of the setoff should be applied to the breach of implied warranty award.

S.C. Code Ann. § 15-38-50, South Carolina Contribution Among Tortfeasors Act ("SCCATA") provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50 (emphasis added). This section expressly provides for setoffs only to (1) tortfeasors who are (2) liable in tort.

Negligence is a cause of action in tort, and the SCCATA permits setoffs as to such actions. Breach of express or implied warranties, on the other hand, are actions in contract. See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995) ("A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie."). In fact, Respondents conceded during trial that this Supreme Court has established that breach of implied warranty claims are not tort claims. (R. p. 1569, line 24—p. 1570, line 8). In the present case, the settling tortfeasors' total contribution totals $2,855,911.77. The jury awarded $1 million against Bostic and Marick for breach of implied warranty. As this cause of action is an action in contract, no setoff should be applied to the damages awarded for breach of implied warranty, but instead the setoff in its entirety should have been applied to the negligence award.

The Court of Appeals erred in applying the setoff of $2,855,911.77 to the entire $4 million judgment. Bostic respectfully requests this Court reverse the application by the Court of

Appeals of the setoff to the breach of implied warranty claims and respectfully requests this Court to apply the setoff as follows: setoff of $2,855,911.77 to the judgment of $3 million entered as to the negligence claims against Bostic and Marick, reducing the total judgment as to the negligence claims to $144,088.23. Bostic further respectfully requests this Court remand to enter judgment in accordance with Apportionment Form (R. p. 36), which apportions 60% to Bostic and 40% to Marick on the negligence claim, and 30% to Bostic and 70% to Marick on the breach of implied warranty claim as follows:

Bostic:	$86,452.94 Negligence
	$300,000.00 Breach of Implied Warranty
Marick:	$57,635.29 Negligence
	$700,000.00 Breach of Implied Warranty
Thoennes:	$1 million Breach of Fiduciary Duty

C. The Court of Appeals Failed to Provide a Holding as to Judgment Against Bostic

The Court of Appeals' holding in Opinion No. 5601 ("Stoneledge II") "reverse[s] the trial court's setoff order and remand[s] for entry of judgment consistent with our decision in Stoneledge I." However, Stoneledge I only addresses entry of judgment as to Marick and Thoennes, and is silent as to the judgment to be entered against Bostic. Bostic, therefore, seeks clarification as to the precise figures the Court of Appeals remands to the Circuit Court for entry of judgment against Bostic, respectfully, consistent with the figures provided herein.

At a minimum, Bostic argues the Court of Appeals erred in its math when it applied the setoff to the implied warranty and negligence claims of $4 million and Bostic respectfully requests this Court reverse the Court of Appeals and remand to the lower court in this respect. In the alternative, Bostic argues the Court of Appeals erred in its application of setoff to the breach

of warranty claims as well. Bostic respectfully requests this Court reverse the Court of Appeals and remand to the lower court to apply the setoff as follows: setoff of $2,855,911.77 to the judgment of $3 million negligence claim against Bostic, reducing the total judgment as to the negligence claims to $144,088.23. Bostic further respectfully requests this Court reverse and remand to the lower court to enter judgment in accordance with the jury's apportionment (60% to Bostic on the negligence claim and 30% to Bostic on the breach of implied warranty claim), which would render judgments as to Bostic in the amount of $86,452.94 on the negligence claim and $300,000.00 for the breach of implied warranty claim.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S RULING AS TO THE STATUTE OF LIMITATIONS

Contrary to its finding in Barr v. City of Rock Hill, 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998), the Court of Appeals in this action held the HOA did not appreciate the degree of damage and effectively tolled the statute of limitations until such time that repairs conducted by a third-party failed. The Court affirmed the trial court's order denying Bostic's motion for directed verdict as to the statute of limitations, finding "there is some evidence these latent defects could not have been discovered through the exercise of reasonable diligence until 2009 at the earliest" and citing Mayer v. Tietex Corp., 331 S.C. 371, 376, 500 S.E.2d 204, 207 (Ct. App. 1998) ("When reviewing a motion for directed verdict, the court must consider all evidence in the light most favorable to the nonmoving party, and may only reverse a jury if the factual findings implicit within it are contrary to the only reasonable inference from the evidence.")

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

A. The Court of Appeals Erred in Tolling the Statute of Limitations Until Repairs Conducted by a Third-Party Failed

The applicable statute of limitations for causes of action sounding in negligence and breach of implied warranties after 1988 is three years. S.C. Code Ann. § 15-3-530 (Supp. 1997). "A cause of action accrues under South Carolina law the moment the defendant breaches a duty owed to the plaintiff." Barr v. City of Rock Hill, 330 S.C. 640, 644, 500 S.E.2d 157, 159-60 (Ct. App. 1998) (quoting Grooms v. Med. Soc'y of S.C., 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989)). S.C. Code Ann. § 15-3-530 provides a "discovery" rule exception to the general three-year statute of limitations, effectively tolling the statute of limitations until a person "knows or by the exercise of reasonable diligence should . . . know that he has a cause of action." Barr, 330 S.C. at 644, 500 S.E.2d at 159-160 (citing S.C. Code Ann. § 15-3-530). "The statute starts to run upon discovery of such facts, as would have led to the knowledge thereof, if pursued with reasonable diligence." Barr, 330 S.C. at 641 65, 500 S.E.2d at 160 (quoting Grayson v. Fid. Life Ins. Co. of Philadelphia, 114 S.C. 130, 135, 103 S.E. 477, 478 (1920)).

"A party has constructive notice if the party knows of 'facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right . . . has been invaded or that some claim against another party might exist.'" Id. (quoting Graniteville Co. v. IH Servs., Inc., 316 S.C. 146, 148, 447 S.E.2d 226, 228 (Ct. App. 1994). The Court of Appeals further held that the "[f]ailure of the injured party to comprehend the full extent of damages . . . is immaterial." Barr, 330 S.C. at 645, 500 S.E.2d at 160 (citations omitted). Here, the factual findings implicit in the evidence reveal one reasonable inference - even in the light most favorable to Respondents - that the homeowners originally discovered defects as early as 2003 and the HOA was on notice as early as 2005 that some claim against Bostic might exist.

At the trial of this matter, Respondents called numerous homeowners to testify as to their observations of the defects in various homes of Stoneledge as early as 2003. Steven Taylor moved into a home in Stoneledge in 2003, when Bostic was still working on the Project, and testified that he noticed water intrusion in the lower level of his home from the time he moved in, more than six years prior to Bostic being named as a Defendant. (R. p. 585, lines 19-20; p. 587, lines 16-21; p. 597, lines 19-22). Mr. Taylor further testified that he had water intrusion "water, a lot of water," in the lower level of his home, including the outside porch, both before and after Marick assumed control of the Project and created the HOA. (R. p. 597, lines 15-25). From 2003 through 2005, Mr. Taylor made several requests to HOA Board members to remedy the defective areas of the home. (R. p. 598, lines 3-7).

In fact, the HOA, through its Marick Board members, made repairs to nearly all of the homes' porches/decks in 2005 to correct cracks that leaked water to the lower levels. (R. p. 600, lines 1-14; p. 601, lines 17-20). Moreover, Mr. Taylor stated that he notified Marick, and specifically Rick Thoennes, a member of the HOA in 2005, of the alleged defects, and that upon notice of the alleged defects, Marick, at the instruction of HOA members, attempted several times to fix the issues. (R. p. 620, lines 21-24; p. 643, lines 9-16).

Another homeowner, Robert White, moved into Stoneledge in June of 2006, three years and eight months before Bostic was sued, and noticed water intrusion in his crawlspace "since day one." (R. p. 1336, lines 17-18; p. 1341, lines 2-5; see also R. p. 1367, lines 15-22) (testifying that he was aware of window leaks in the months following his purchase). Upon taking control of the property, Mr. White identified a "hefty list" of punch items, and "continued to deal with the [Marick] folks for those." (R. p. 1338, lines 12-18). Mr. White was aware that the HOA, controlled by Marick, was responsible for maintaining the exterior of the building. (R. p. 1355,

lines 1-5). Mr. White testified that the [Marick] folks he regularly dealt with regarding the alleged defects were Rick Thoennes and Tim Roberson, both members of the HOA in 2006. (R. p. 1338, lines 1-6). Mr. White testified that he notified HOA members and Nathan Hornaday, the project superintendent hired by Mr. Thoennes, of the roof leaks, numerous window leaks, crawlspace leaks, and a door leak. (R. p. 1340, lines 11-16; p. 1367, lines 19-24). Like Mr. Taylor, Mr. White testified that upon notice to the HOA, the HOA assigned Nathan Hornaday to assist in repairing the various defects. (R. p. 1339, lines 9-21; p. 1367, lines 23-24).

In 2005, five years before Bostic was named as a Defendant, Mr. Thoennes was fully aware that several decks had cracks in the concrete. (R. p. 1467, lines 16-25). In response to the homeowners' complaints, Mr. Thoennes, as managing member of Marick and an HOA member, undertook to correct those defects without notifying Bostic of the defects any time prior to Respondents naming Bostic as a Defendant in February 2010. (R. p. 1464, lines 1-6).

Nathan Hornaday arrived to Stoneledge as superintendent in 2005. (R. p. 759, lines 12¬23). Mr. Hornaday was instructed to walk through all of the 25 partially completed, unsold units to identify any potential problems or defects, and testified that he and Rick Thoennes walked through several of the units together. (R. p. 760, lines 16-20; p. 761, lines 5-10). Upon arrival to the site, Mr. Hornaday observed that the porches and decks were leaking, creating water stains on the rock and ceilings. (R. p. 770, lines 21-24; p. 771, lines 2-6). Mr. Hornaday also observed water intrusion inside the homes, independent of the leaking porches and decks, leading to water stains around the corners of windows and on the floors. (R. p. 772, lines 6-11; p. 781, lines 13-25).

Furthermore, Mr. Hornaday testified that these issues were not present in only one unit, but rather several separate units. (See R. p. 780, lines 3-11) (testifying of various window leaks

among five or six units). Mr. Hornaday further testified that Rick Thoennes was aware of the leaking decks and porches, and that he conducted walkthroughs with Rick Thoennes to show him the various defects. (See R. p. 773, lines 8-13; p. 781, lines 13-25) (testifying that Rick Thoennes personally observed the water stains on windows and floors). Mr. Hornaday specifically recalled reporting all of his observations in the Phase I units to Mr. Thoennes. (R. p. 761, lines 5-10). Most telling, Mr. Hornaday responded affirmatively when asked whether he believed that Mr. Thoennes was aware of all of the conditions about which Mr. Hornaday testified. (R. p. 787, lines 11-14).

Respondents also called their forensic engineering expert, Derek Hodgin, who testified that any reasonably prudent general contractor who saw the conditions in Unit 33 when Marick re-permitted the Project in 2005 - water intrusion around the windows and doors, inadequate flashing, and other defects - would be on notice of several construction defects and impose upon it an obligation to conduct further investigation and make repairs. (R. p. 1042, line 5 - p. 1044, line 24; p. 1046, line 5 - p. 1049, line 3). Notably, Mr. Hodgin's testimony was not refuted by any other experts. Despite the obvious defects, at no time thereafter did the HOA notify Bostic of any defects or potential claim.

The Court of Appeals agrees in its Opinion that there was testimony during trial that some homeowners, namely Steven Taylor, knew about issues including roof leaks and water intrusion as early as 2003. Mr. Taylor notified Rick Thoennes, then a member of the HOA of defects in 2005. Marick undertook repairs, but it did not become apparent those repairs were inadequate until 2008/2009.

The Court of Appeals found that the homeowners did not appreciate their cause of action against Bostic because Marick undertook repairs and "it did not become apparent these repairs

were inadequate until drought conditions ended in 2008/2009." It is immaterial that Marick's repairs were not discovered to be inadequate until 2008/2009 when the drought ended, because the homeowners were aware as early as 2003 Bostic's original construction was inadequate so as to necessitate repairs in the first place. The fact that it became necessary for Marick to repair Bostic's work at all indicated the HOA discovered defects. As provided in Barr, knowing the extent of the damage is immaterial. Barr, 330 S.C. at 645, 500 S.E.2d, at 160.

Therefore, the Court of Appeals erred in considering whether the homeowners appreciated the degree of the damage. Rather, it is axiomatic that the necessity of repair efforts by the subsequent general contractor constituted sufficient notice of existence of a claim. Furthermore, by the result of its holding, the Court of Appeals essentially tolls the statute of limitations for anyone 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 (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., 426 S.C. 1, 825 S.E.2d 707 (Ct. App. 2019) (finding plaintiffs' history of due diligence with repairs and maintenance does not negate the fact that plaintiff was on notice of potential claims and failed to timely file suit; an injured party "must act with some promptness" when they are on notice of a potential claim; and "the fact that the injured party may not comprehend the full extent of the damage is immaterial") (internal citations omitted).

The Court of Appeals declined to follow Barr and likened the manifestation of the defects at Stoneledge to those in Santee, where the defects in silos were latent and

undiscoverable. Santee Portland Cement Co. v. Daniel Intl Corp., 299 S.C. 269, 384 S.E.2d 693 (1989), *overruled on other grounds*. While the defects at Stoneledge may have been "hidden by stone veneers and exterior walls" like the defects in Santee, unlike Santee the defects at Stoneledge were manifesting damages by way of water intrusion necessitating repairs. The only manifestation of damages in Santee were cracks in the concrete, which the experts testified was common in concrete structures. Id. at 274, 384 S.E.2d at 696. Again, unlike Santee, pervasive water intrusion through a building envelope is not a common condition in a home and the HOA's expert testified the "conditions of the windows and doors in the abandoned units would put a general contractor on notice that an investigation of the other units was necessary." Despite any assurances or repairs provided by *Marick*, undoubtedly the HOA was on notice of a claim against *Bostic* at that time, thus triggering the statute of limitations. Allwin, 426 S.C. at 20-21, 825 S.E.2d at 717.

B. The Court of Appeals Failed to Consider the Knowledge Imputed Upon the HOA in Respect to its Knowledge of the Existence of a Claim

The Court of Appeals erroneously considers the discovery of defects in respect to the individual homeowners, instead of reviewing the knowledge imputed upon the HOA. After its analysis of homeowners' testimony who knew of defects and the HOA's own expert's testimony, the Court of Appeals writes "[h]owever, other homeowners had no such knowledge [of the defects]." It is true, there were some homeowners who had no knowledge and did not discover significant defects until 2009, however, it is certain in the very least that the HOA was on notice of a claim against Bostic as early as 2005/2006.

At the time numerous defects were originally discovered in 2005, the HOA owed various duties to the homeowners established through the covenants and bylaws. The covenants and bylaws empowered the HOA to "employ attorneys . . . to advise, serve and represent the

Association when deemed necessary" and to "do anything necessary or desirable . . . which the Association deems necessary to carry out the purposes of the Association . . .." (R. p. 2295). Additionally, the covenants and bylaws bound the HOA to manage and maintain the Common Area and the Service Facilities. These areas included all real property and buildings, including the building envelopes. (R. p. 514, lines 4-22; p. 2280; pp. 2738-39). These covenants and by-laws make abundantly clear that the responsibility to maintain, repair, and seek relief, if necessary, rested solely on the HOA in 2005. (See generally pp. 2272-2363) (HOA governing documents identified or admitted into evidence at R. p. 512, line 21 - p. 514, line 24). In 2005, the HOA had both the power and obligation to assert a claim against Bostic. Nothing precluded the HOA from notifying Bostic of a potential claim, or from filing suit against Bostic. To the contrary, the HOA, from 2005 through the time of trial, had every ability, and was charged with the duty of asserting a claim against Bostic, but chose not to do so until 2010.

During the trial in this case, many of Respondents' own witnesses testified that the HOA received actual notice of various construction defects as early as 2005, approximately five years before naming Bostic as a Defendant. Both Mr. Taylor and Mr. White made abundantly clear that, between 2003 and 2006, they notified employees and representatives of Marick - and specifically members of the HOA - that their respective homes were suffering from numerous defects leading to water intrusion and damage. During that time, and in response to the homeowners' complaints, the HOA undertook to repair various homes, including waterproofing all but one of the homes' porches. These repairs were done at the express instruction of HOA members Rick Thoennes and Tim Roberson. Moreover, the HOA undertook these repairs of the defects without notifying Bostic at any time prior to February 2010.

Moreover, the testimony of Rick Thoennes and Nathan Hornaday unequivocally demonstrates actual knowledge by the HOA of numerous defects as early as 2005. The two inspected many of the units upon arrival to the Project in 2005, and both personally observed several areas of concern, both inside and outside the units. Although Mr. Thoennes testified that he could not recall when he received notice of the defects, Mr. Hornaday's testimony makes clear that Mr. Thoennes - an HOA Board member - was fully aware of leaking porches, decks, and windows causing visible damage in 2005.[4] Moreover, Mr. Hornaday testified that he engaged subcontractors, at the direction of Mr. Thoennes, to make repairs to various units, while never once notifying Bostic of the defects.

While Respondents' witnesses Rick Thoennes and Robert White testified that they were unaware of the pervasiveness of the defects until sometime in 2008 when the homeowners assumed control of the HOA, such unawareness is irrelevant as to the expiration of the statute of limitations. The HOA has the authority to act and file a claim on behalf of the homeowners. Here, the HOA had actual knowledge of the defects, yet failed to file its claims against Bostic within the three-year statute of limitations.

C. The Court of Appeals Did Not Reach Bostic's Arguments Opposing Equitable Tolling

The Court of Appeals did not reach Bostic's argument opposing equitable tolling of the statute of limitations as set forth in its Final Brief and argued before the Court of Appeals. However, to the extent relevant, Bostic continues to raise and rely on its arguments opposing equitable tolling.

Bostic presented its arguments to the Court of Appeals in opposition to Respondents' argument that the three-year statute of limitations should be equitably tolled under Magnolia

[4] The jury's $1 million verdict on the breach of fiduciary duty claim against Mr. Thoennes in his capacity as board member is consistent with the jury's factual finding that the HOA knew of a claim but failed to act.

North Prop. Owners' Ass'n v. Heritage Cmtys., Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). In its Opinion, the Court of Appeals provides, "Bostic also appeals the portion of the trial court's order finding the statute of limitations was tolled during the time Marick's officers controlled the HOA board. In light of our decision on the statute of limitations issue presented, we decline to reach the equitable tolling issue." The Court did not reach this argument since its disposition on the statute of limitations disposed of the equitable tolling argument.[5] Bostic continues to rely on the argument that the statute of limitations should not be equitably tolled.

Specifically, Respondents contend that Magnolia North stands for the proposition that the statute of limitations is tolled during the time a developer controls the HOA where the HOA has an actionable claim. (R. p. 1532, lines 4-19). Respondents also contend, if only by reference, that the statute of limitations should be tolled because some of the defects were not observable until an expert investigation in 2010 by Derek Hodgin. (R. p. 1537, line 20 - p. 1538, line 6).

The facts in Magnolia North are readily distinguishable from those in the present action. Bostic was never in control of, nor was it ever actively involved in, the HOA. Bostic was merely the initial general contractor for the Project. Upon assuming the Project, Marick created and controlled the HOA from 2005 to 2008, at which time it turned over control to the homeowners. The HOA, during the aforementioned period, had both opportunity and incentive to pursue claims against Bostic for the construction defects, but chose not to. In fact, they had an obligation to do so under its own bylaws. Moreover, the HOA Board members had notice of these defects almost immediately upon Marick assuming control of the Project, and actively undertook remedial action without once notifying Bostic of any potential claims.

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[5] The Court of Appeals simply provides in its Opinion that it did not reach equitable tolling argument, therefore this argument was not overlooked or misapprehended by the Court of Appeals pursuant to Rule 221(a), SCACR ("A petition for rehearing shall be in accordance with Rule 240 and shall state with particularity the points supposed to have been overlooked or misapprehended by the court.").

The rationale underlying the decision in Magnolia North - that the developer, while in control of the POA, could not have been expected to initiate an action against itself during its time of control - does not apply here because Marick, not Bostic, controlled the HOA and had ample incentive to pursue claims against Bostic within three years after notice of the defects. Instead, the HOA attempted repairs on their own initiative through 2008 while refusing to notify Bostic of the defects in any manner. Bostic received notice of these claims in February 2010, over five years after the HOA received notice of the defects, and nearly two years after the statute of limitations had expired.

Furthermore, South Carolina courts have limited the application of equitable tolling, and have refused to apply equitable tolling in situations where the plaintiff has not alleged any misconduct by a defendant (here, Bostic) in actively misleading the claimant. See State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013); Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009); Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009); Hopkins v. Floyd's Wholesale, 299 S.C. 127, 382 S.E.2d 907 (1989); Kimmer v. Wright, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011); Ross v. Ross, 394 S.C. 261, 715 S.E.2d 359 (Ct. App. 2011); Am. Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009); and Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008) ("Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations.").

In Pelzer, the court outlined the circumstances that give rise to equitable tolling relief:

> Equitable tolling has been deemed available where -
>
> -extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.
>
> -the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been

> induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.
>
> -the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.
>
> It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

Pelzer, 378 S.C. at 521,662 S.E.2d at 620-21 (emphasis added).

Pelzer makes clear that equitable tolling should be applied only where a defendant has actively misled a plaintiff about a cause of action, or the plaintiff is somehow prevented from asserting his or her rights. Id. No party has alleged misconduct on behalf of Bostic that would give rise to tolling the statute. Moreover, nothing prevented the HOA, on behalf of the homeowners, from asserting its rights (clearly delineated in its own bylaws) against Bostic from 2005 through early 2007.

Respondents argue that, under Magnolia North, the statute of limitations should be tolled from 2005 to 2008, when control of the HOA was turned over to the homeowners. Respondents fail to acknowledge that they had recourse, and actually recovered from several third parties. Respondents asserted a breach of fiduciary duty action against three members from the Marick HOA - Larry Lollis, William Cox, and Rick Thoennes. In asserting these causes of action, Respondents implicitly recognize that the Marick HOA did not act timely to assert a claim against Bostic, and that such delay resulted in substantial property damage. As a result, Respondents obtained a significant judgment under their breach of fiduciary duty claims. Not a single factor espoused in Pelzer is applicable in the case at bar, particularly where Respondents

were successful on a cause of action that alleged failure of HOA Board members to perform their duties.

The evidence at trial readily demonstrates that the HOA had ample opportunity and incentive to assert a claim against Bostic any time between 2005, when they learned of the defects, and late 2008, when the three-year statute of limitations expired. This factual scenario is vastly different from Magnolia North, where the developer/POA would have had to assert a claim against itself to preserve its rights. Finally, South Carolina law demands a limited application of equitable tolling, and suggests applicability only where a defendant's misconduct has led to the expiration of the statute of limitations, which has never been alleged in this case.

For the forgoing reasons, Bostic respectfully requests this Honorable Court reverse the Court of Appeals' affirmance of the trial court's denial of directed verdict based upon the statute of limitations.

CONCLUSION

Bostic respectfully requests this Court reverse the Court of Appeals' misapplication of law and failure to follow the precedents of this Court in affirming the Circuit Court's denial of directed verdict based upon statute of limitations. An examination of both the record and the Court of Appeals' decision of October 10, 2018, indicates the Court of Appeals has likewise, inadvertently, overlooked certain crucial evidence, as provided above, and Bostic respectfully requests a reversal of the Circuit Court's denial of directed verdict based upon statute of limitations.

In the alternative, Bostic respectfully requests this Honorable Court reverse the decision of the Court of Appeals and apply the setoff as to the negligence claims only, or in the alternative

reverse the Court of Appeals' miscalculation of the setoff resulting in a $1,000,00.00 computation error and enter judgment as to Bostic consistent with the figures provided herein.

Respectfully submitted,

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Dated: This 19th day of September 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
The Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2019-000041
Lower Court Case No. 2009-CP-37-00652

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 Brief of Respondent-Petitioner by way of U.S. Mail, stamped First Class delivery, on September 19, 2019, addressed to Petitioners-Respondents' attorneys of record, addressed as follows:

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