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OCT 10 2019

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  
Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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Appellate Case No. 2019-000038  
Lower Court Case No. 2009-CP-37-00652

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

v.

IMK Development Co., LLC; Keowee Townhouses, LLC; Ludwig Corporation, LLC; SDI Funding, LLC; Medallion at Keowee, LLC; Integrys Keowee Development, LLC; Marick Home Builders, LLC; Bostic Brothers Construction, Inc.; Miller/Player & Associates; Bradford D. Seckinger; John Ludwig; William Cox; Larry D. Lollis; Rick Thoennes; M Group Construction and Development, LLC; Mel Morris; Joe Bostic; Jeff Bostic; Clear View Construction, LLC; Michael Franz; MHC Contractors; Miguel Porras Choncoas; Builders First Source-Southeast Group; Mike Green; Southern Concrete Specialties; Carl Compton d/b/a Compton Enterprise a/k/a Compton Enterprises; Gunter Heating & Air; All Pro Heating; A/C & Refrigeration, LLC; Coleman Waterproofing; Heyward Electrical Services, Inc.; Tinsley Electrical, LLC; Hutch N Son Construction, Inc.; Upstate Utilities, Inc.; Southern Basements; Carl Catoe Construction, Inc.; T.G. Construction, LLC; Delfino Construction; Francisco Javier Zarate d/b/a Zarate Construction; Alejandro Avalos Cruz; Herberto Acros Hernandez; Martin Hernandez-Aviles; Francisco Villalobos Lopez; Ambrosio Martinez-Ramirez; Ester Moran Mentado; Socorro Castillo Montel; MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; Eufacio Garcia; Everado Jarmamillio; Garcia Parra Insulation, Inc.; J&J Construction; Jose Nino; Jose Manuel Garcia; Eason Construction, Inc.; Vincent Morales d/b/a Morales Masonry and Miller/Player & Associates, Defendants,

Of Which Marick Home Builders, LLC and Rick Thoennes are the Respondents-Petitioners,

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**BRIEF OF RESPONDENTS**

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## QUESTIONS PRESENTED BY PETITIONER

1. Did the Court of Appeals err by re-allocating the cumulative verdict?
2. Did the Court of Appeals err by failing to properly setoff to the entire jury verdict?

## STATEMENT OF THE CASE

This appeal arises out of a multi-unit residential construction trial. The Plaintiffs filed this case in individual and representative capacities, as well as through a Property Owners Association, alleging construction defects at a townhome project in Oconee County known as Stoneledge (hereinafter “Stoneledge” or “Project”).

Stoneledge consists of 80 townhomes developed during two phases of construction. Only Phase I of construction is at issue in this Appeal. Bostic constructed the exteriors of the Phase I units alleged to be defective. Plaintiffs made claims against two general contractors affiliated with the Project, Marick, and its affiliated member Rick Thoennes, (hereinafter collectively “Marick”) and Bostic Construction (hereinafter “Bostic”). Plaintiffs also sued Bostic as the developer of Phase I and IMK as the developer of Phase II. Plaintiffs alleged that the exterior roofing, stonework, cedar siding, decks, windows, doors, and foundations were defectively constructed or installed.

In the fall of 2013, the Phase I case was tried to verdict. On November 7, 2013, the jury returned a verdict against Marick and Thoennes for negligence and breach of warranty of workmanlike service against Rick Thoennes (among others) for breach of fiduciary duty. The jury returned a verdict for the Plaintiffs for actual damages of \$3,000,000.00 for negligence in construction, \$1,000,000.00 for breach of implied warranty of workmanlike service, and \$1,000,000.00 for breach of fiduciary duty. The jury apportioned the damages amongst the parties as following:

### **Negligence**

IMK Development Co., LLC/Marick Home Builders, LLC	40%
Bostic Brothers Construction, Inc.	60%

**Implied Warranty of Workmanlike Service** (\$1,000,000.00)

IMK Development Co., LLC/Marick Home Builders, LLC 70%

Bostic Brothers Construction, Inc. 30%

**Breach of Fiduciary duty** (\$1,000,000.00)

IMK Development Co., LLC

Integrus Keowee Development, LLC

William C. Cox

Larry D. Lollis

Rick Thoennes<sup>1</sup>

Judge Macaulay initially issued a Form 4 order entering judgement against all Defendants in varying amounts dated November 8, 2013. Marick and Thoennes promptly filed a Motion for Reconsideration and/or to Alter/Amend Judgment pursuant to The South Carolina Rules of Civil Procedure, Rule 59(e). On January 22, 2015, Judge MaCaulay issued an Order denying those Post-Trial Motions. Judge Macaulay issued a Form 4 Order dated January 30, 2015 entering a “cumulative” judgment against Marick and Thoennes for \$2,144,088.44. Marick again promptly filed a Motion for Reconsideration and/or to Alter/Amend Judgment pursuant to The South Carolina Rules of Civil Procedure, Rule 59(e), on the January 30, 2015 Order. Marick contemporaneously filed a Notice of Appeal on February 20, 2015. The Court of Appeals issued its final order on October 10, 2018 and Marick filed a Petition for rehearing on October 25, 2018. That petition was finally denied on December 13, 2018.

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<sup>1</sup> No verdict was returned against Marick for Breach of Fiduciary Duty.

## STATEMENT OF FACTS

This case was originally filed May 29, 2009 by named Plaintiff Paul H. Hund, III, M.D., an owner in Phase II (hereinafter "Hund"). (See R.p. 133-160 and R.p. 161-199). Hund's Complaint alleged, among other things, water intrusion to the exterior cladding, improper flashing, improper use of building paper, and inadequate installation of building components in Phase II of the Project.

Upon information and belief, the Stoneledge Owners Association (hereinafter "SOA") took the position that Dr. Hund's Complaint was improper as the SOA was responsible for the exterior of the units. In November of 2009, the owners voted to retain an attorney to represent the SOA and amend the lawsuit to include the SOA and both Phase I and Phase II of the Project. Plaintiffs again alleged, among other things, water intrusion to exterior cladding, improper flashing, improper use of building paper, inadequate installation of building components, improper site work/grading, improper stone application and undisclosed latent defects.

Bostic was the general contractor and developer for Phase I construction. Following completion of the exterior of all Phase I units and completion of a majority of the interiors of Phase I units, Bostic terminated construction at Stoneledge. IMK purchased the development and Marick began work as general contractor for IMK in 2005 following Bostic at the Project. Evidence has been submitted that the exteriors of the Phase I buildings were already built upon IMK's arrival and Marick performed repair work at the request of unit owners and IMK on the Phase I units. Marick on behalf of IMK also began construction of Phase II of the Project. Only one of Plaintiffs' witnesses purchased a unit from IMK, the rest were purchased from Bostic or another party. Marick did not sell any units.

## ARGUMENTS

### I. THE COURT OF APPEALS WAS CORRECT IN ALLOCATING THE AWARD TO PARTICULAR CAUSES OF ACTION

The Court of Appeals was correct that the trial court invaded the province of the jury when it amended each cause of action to independently and separately support three \$5 million verdicts. Joiner v Bevier, 155 S.C. 340, 355, 152 S.E.2d 652, 657 (1930). (It is [the judiciary's] duty to enforce a verdict, not make it."). Thereafter, the Court of Appeals correctly reinstated the jury's verdict and its allocation of damages to the three separate causes of action. If it had not done so, the Jury's separate verdicts were moot and the breakdown of causes of actions and connected verdict amounts superfluous.

Plaintiff/Petitioner/Appellant filed suit alleging different causes of action, including, but not limited to Negligence, Breach of the Warranty of Workmanlike Service, and Breach of Fiduciary Duty. Additionally, Plaintiffs approved the jury form with Plaintiffs' chosen causes of action and argued on each of those causes of action. Plaintiffs now argue in favor of a blank sheet verdict form with an amount attached to no particular cause of action. This would effectively eliminate all of the elements of each of the causes of action submitted to the jury and the jury's decision, requested by the Plaintiff, in awarding damages on each separate cause of action. Plaintiff submits no precedent or case law for this drastic reformation of a specific jury verdict. Granting Plaintiffs' argument on this issue would obviate the need for pleading, proving, and arguing specific causes of action and submitting them separately to the Jury.

Further, no colloquy was made between counsel and the trial court as to the cumulative nature of the verdict, nor was there inquiry made of the jury as to its intent. Defendants dispute that they were involved in a discussion concerning the verdict being cumulative such that each cause of action would essentially become a \$5 million verdict. Defendants do not believe this

exchange occurred in such a way as to have properly given Defendant an opportunity to object or argue the matter after the verdict was rendered or the trial court made the alleged ruling. Even if the exchange had occurred, said ruling is for the jury, and not the court, and can only be cumulative when the claims at issue are against the same Defendants. Without commonality of claims and Defendants, making the recovery cumulative calls for speculation as to the authority provided by the jury, which limited the Plaintiffs to certain awards under each cause of action pled against certain Defendants. Erasing the jury's findings and verdicts would allow Plaintiffs to assess any award against any Defendant in any manner or combination Plaintiff wanted.

In Keeter v. Alpine Towers Int'l, Inc., which was the sole authority relied on by Plaintiffs' counsel in support of the universal cumulative verdict with setoff, Plaintiff brought an action against Alpine, for strict liability, negligent design, and negligent training after Plaintiff was injured and deemed a paraplegic as a result of a fall. The jury returned a verdict for the Plaintiff on each cause of action against Alpine. The jury awarded damages as follows: strict liability - \$500.00; negligent design actual damages - \$900,000.00; negligent design punitive damages - \$160,000.00; negligent training actual damages - \$2,500,000.00; and punitive damages for negligent training - \$950,000.00. Keeter v. Alpine Towers Int'l, Inc., 399 S.C. 184, 187 (Ct. App. 2012). Once the jury returned the verdicts, Plaintiff made a motion asking the court to inquire of the jury whether it meant for the damages awarded to be cumulative. While the jury was still in the courtroom, the judge asked the forelady and she responded that yes, it was to be cumulative. *Id.* at 200. The discussion between the judge and the forelady required a back and forth between the two to make a final determination of the jury's intent.

In the case at bar, there was no such colloquy. The trial court did not make such inquiry of the jury, and the jury did not decide such issue. As it stands, the trial court has invaded the

province of the jury in two ways: (1) by ruling that the verdict is cumulative sua sponte without inquiring of the jury as to its intent; and (2) by re-writing the verdict and imposing a new and different damages amount over and above the amounts awarded for each individual cause of action. No evidence was ever presented in this case to persuade that the jury intended that the damages amounts written in the three blanks by the jury were to be added together for a total amount, unlike the jury intent as evidenced in Keeter. As noted further in Allegro, Inc. v. Scully, 409 S.C. 392, 405, 762 S.E.2d 54, 61 (Ct. App. 2014), reh'g denied (Aug. 26, 2014), cert. granted (Apr. 22, 2015), the court determined the intent of the jury's award by questioning the jury before and after the verdict was rendered. No interaction occurred between the court and the jury in the case at bar to determine the intent of the jury.

“It is not fair for the trial court to say what it thinks the verdict should be.” Camden v. Hilton, 360 S.C. 164, 173 (Ct. App. 2004). A jury's verdict should be upheld when possible to do so and to carry into effect what was clearly the jury's intentions. Id. The trial court in this case decided to change the jury's award to what it thought the award should have been. It made this determination while using no guidance from that of the fact finder, the jury and the Court of Appeals was correct to overturn it.

## **II. THE COURT OF APPEALS CORRECTLY APPLIED SETOFF**

### **A. Setoff Should Not Be Applied To Breach of Fiduciary Duty**

The Appellate Court was correct in its application of setoff as no party settled a Breach of Fiduciary Duty cause of action. The jury in this matter returned a verdict as follows: (1) \$3 million for Negligence as to Appellant and Marick/IMK; (2) \$1 million for Breach of Implied Warranty as to Appellant and Marick; and (3) \$1 million for Breach of Fiduciary Duty as to Defendants IMK, Integrys, Rick Theonnes, Larry D. Lollis, and

William C. Cox, individually.<sup>2</sup> If a plaintiff has received, or is to receive, payment from another tortfeasor- defendant, a motion should be made to provide the other tortfeasor- defendants a setoff of any amounts paid by the other tortfeasor-defendants toward any judgment entered. See Powers v. Temple, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967). This setoff shall be kept from jury consideration and applied by the court. *Id.* The underlying rationale for such setoff is avoiding a plaintiff double recovery from multiple tortfeasor-defendants. See Smith v. Widener, 397 S.C. 468, 471- 72, 724 S.E.2d 188, 190 (Ct. App. 2012).

[T]here can be only one satisfaction for an injury or wrong. A settlement by a joint tortfeasor reduces the claim against the others to the extent of any amount stipulated by the release or covenant. Therefore, before entering judgment on a jury verdict; the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. When the settlement is for the same injury, the nonsettling defendant's rights to a setoff arises by operation of law.

*Id.* (emphasis added) (internal citations and quotations omitted). This Honorable Court elaborated, "[S]ection 15-38-50 grants the court no discretion ... in applying a set-off." *Id.* (quoting Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271-72 (Ct. App. 1999)).

South Carolina Code § 15-38-50 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;

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<sup>2</sup> No verdict was returned against Marick for Breach of Fiduciary Duty.

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).

The causes of action for Negligence and Warranty differ greatly in their common law genesis, elements, and definition from Breach of a Fiduciary Duty. Further, in this case the jury only found one set of defendants liable for Breach of Fiduciary Duty. No other parties, settling or not settling, was sued for Breach of Fiduciary Duty apart from those identified on the verdict form. The Court of Appeals was correct that no other board members settled with the SOA, nor did any other parties settle and receive a release for Breach of Fiduciary Duty.

Additionally, Plaintiffs cannot recover a \$5 million award for Breach of Fiduciary Duty as the jury attributed portions of fault to Bostic. Assuming the Supreme Court agrees with Plaintiffs' argument that the trial court was correct by allocating \$5 million to each cause of action, which Respondents/Petitioners disagree with, there could be no allocation of that amount to the other Defendants as only Rick Thoennes was sued for Breach of Fiduciary Duty. Therefore, the jury's finding that Bostic was responsible for 30% of the Warranty claims and 70% of the Negligence claims would be rendered meaningless as the jury's verdict would essentially mean Rick Thoennes was 100% at fault for all of the damages. This clearly is not correct and was not the Jury's verdict. Therefore, any argument that \$5 million should be applied to each cause of action is not only incorrect, but impossible in light of the Jury's verdict.

Lastly, and most importantly, the trial court's January 30, 2015 Order altering and amending the Judgment entered in this case, was improper and is completely contrary to the evidence presented at trial, the applicable law, and the Verdict Form presented to the jury. Under Section 3 of the Verdict Form, the Court submitted the question of liability for breach of

fiduciary duty to the jury separately for IMK, IKD, Thoennes, Cox & Lollis. The jury Verdict Form indicates that the jury set the actual damages resulting to the Plaintiffs as a result of the breach of fiduciary duty cause of action at \$1 million. This represents the maximum sum that the jury allowed for recovery pursuant to the Plaintiffs' breach of fiduciary duty cause of action. No other claims against the individual Defendants including Thoennes were considered.

Therefore, the setoff cannot be applied logically or fairly to the Breach of Fiduciary Duty cause of action.

**B. 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.**

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.<sup>3</sup> 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:

$$\begin{array}{r} \$4,000,000.00 \\ -\$2,855,911.77 \\ \hline \mathbf{\$1,144,088.23} \end{array}$$

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

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<sup>3</sup> 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.

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 figures, 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

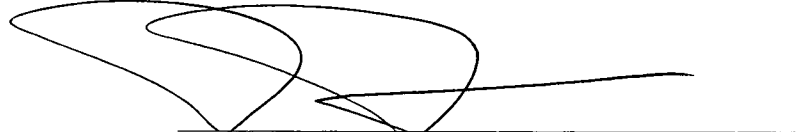
Respondents/Petitioners respectfully request this Honorable Court reverse the Court of Appeals and remand this matter to the trial court with instructions to correct the miscalculation as set forth above.

#### CONCLUSION

Respondents/Petitioners are statutorily entitled to an offset of all funds paid to Plaintiffs by all settling tortfeasor-Defendants, totaling \$2,855,911.77. The setoff does not apply to claims of Breach of Fiduciary Duty. As a result, Respondents/Petitioners respectfully request that this matter be remanded with instructions that the \$4 million Judgment against Marick/IMK and Bostic be reduced to \$1,144,088.23, to be apportioned according to the jury Verdict Form as set forth above.

In the alternative, Respondents/Petitioners respectfully request this Honorable Court to remand with instructions for a new trial based on several, independent grounds set forth here and in the appeal.

Respectfully submitted,



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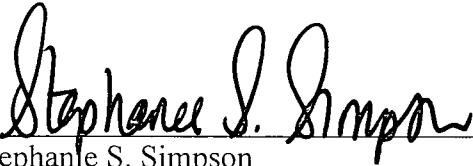
Of Which Marick Home Builders, LLC and Rick Thoennes are the Respondents-Petitioners,

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**PROOF OF SERVICE**

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I certify that I have served the Brief of Respondents-Petitioners Marick Home Builders, LLC and Rick Thoennes by depositing a copy of it in the United States Mail, First Class postage prepaid, on October 9, 2019, addressed to Respondents' attorneys of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, P.O. Box 773, Charleston, SC 29401.

  
Stephanie S. Simpson  
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October 9, 2019

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