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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

PETITIONERS-RESPONDENTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE ISSUES

1. Should a setoff of the funds from defendants who settled prior to trial be applied to one cause of action?

2. Did the Court of Appeals properly affirm the trial court's denial of Bostic's directed verdict and JNOV when conflicting evidence existed as to whether the HOA knew or should have known it had a cause of action against Bostic and when equity supported tolling the statute until the owners gained control of the HOA Board?

STATEMENT OF THE CASE

On May 29, 2009, in Oconee County, Stoneledge at Lake Keowee Owners' Association, Inc. ("Plaintiff" or "HOA") filed civil action 2009-CP-37-00652 (the "lower court action"), which arose out of the development and construction of a community on Lake Keowee (the "Project" or "Stoneledge"). The lower court action spawned multiple appeals including this appeal, which Bostic Brothers Construction, Inc. filed following a Phase I jury trial and verdict in favor of the HOA. Marick Home Builders, LLC and Rick Thoennes filed a separate appeal, now Appellate Case No. 2019-000038, following the verdict.

In 2002, Bostic Brothers Construction, Inc. ("Bostic") began construction as the original general contractor of the Project and its principals Jeff and Joe Bostic held an ownership interest in the initial development company. (R. p. 0926, lines 15-22). In 2005, IMK Development Company ("IMK") purchased the Project and Marick Home Builders, LLC ("Marick") took over construction. (R. p. 1438). IMK was comprised of Marick and Integrys Keowee Development, LLC ("IK"). (R. p. 1089-1090). The principals of IK included William Cox and Larry Lollis. (R. p. 1089-1090). Rick Thoennes ("Thoennes") was the license holder and principal of Marick. (R. p. 1431-1433). In addition, Thoennes had multiple other roles in the Project. (R. p. 1435-1439;1447-1448; 1450;1461-62; 1448).

The HOA filed suit in 2009 and amended its complaint to add Bostic Brothers Construction, Inc. on February 9, 2010. (R. p. 120-144). The HOA alleged several causes of action including negligence, breach of warranty, and breach of fiduciary duty against entities and individuals involved in the Project including, among others, 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 counsel's arguments that 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. 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. On November 8, 2013, the jury returned a verdict of liability on three causes of action: negligence against Bostic and Marick; breach of warranty of service against Bostic and Marick; and breach of fiduciary duty against IMK, IK, Thoennes, William Cox and Larry Lollis. (R. pp. 29-35). The jury valued the damage at $5 million, although that amount was separated out on the verdict form.

Immediately after the jury verdict was announced, 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. (R. p. 2055-

2056). 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 and entered rulings on the motions in January 2015. (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]

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

Stoneledge 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 of Phase I of the Project, and its principals Jeff and Joe Bostic were owners of the initial development company, Keowee Townhouses, LLC. (R. p. 0926). Keowee Townhouses, LLC filed the original Declaration of Covenants and Restrictions for Stoneledge. Bostic constructed numerous units in Phase I, and several units were in various stages of completion when Bostic

[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.

ceased construction and ultimately entered into bankruptcy. (R. p. 0708; R. p. 1452; R. p. 2389-2406).

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, and assigned its rights as Declarant to IMK (R. pp. 1381-1382;1399-1401). The members of IMK were Marick and IK (Integrys Keowee Development). (R. p. 1381-1382; 1399-1401). IK's owners were William Cox, Tim Roberson and Larry Lollis. (R. p.1381-1382;1399). The original HOA named The Towne Homes on Keowee Homeowners' Association was changed to Stoneledge at Lake Keowee Owners Association, Inc., and IMK appointed Rick Thoennes, William Cox, and Tim Roberson as members of the HOA Board. (R. p. 0508-p. 0514; R. p 0595-p. 0597; R. p. 1402; R. p. 2271; R. pp. 2279--2354; R. p. 2363). IMK remained in control of the board of the HOA until September 26, 2008. (R. p. 1402; R. p. 2271). Marick and its license holder Thoennes obtained 26 new building permits and began work on Phase I in 2005. (R. p. 757-758; R. pp. 791-798).

At trial, the Plaintiff's witnesses included homeowners Robert White, Steve Taylor, Donna Furnari, and Michael Furnari. Each testified about their knowledge of the problems at Stoneledge. Steve Taylor testified that when Bostic left the project, he did not know anything about the quality of construction in the unfinished units. (R. p. 0590, lines 5-14). Mr. Taylor also testified that he had various problems in his unit. Marick repaired or attempted to repair these problems. (R. p 0597, line 15-p. 0600, line 20). Mr. Taylor became president of the HOA board when it was first turned over to the homeowners in 2008. According to his testimony, in late 2008, heavy rains followed a long drought, and multiple Phase I units began showing significant water infiltration problems. (R. p. 0603, line 9-p. 0606, line 3; R. p. 0620, line 21-p. 0621, line 12.). Steve Taylor and Robert White, another homeowner, both testified certain latent deficiencies were not

discovered until 2009, when a report of a handrail problem in the unit of owner Jim Logan revealed severe rot and deterioration behind the stone facade. (R. p. 0606, line 14-p. 0607, line 19; R. p. 0624, line 10-p. 0625, line 12).

Mr. Thoennes, a licensed general contractor and managing member of Marick, which was also a member of IMK, remained on the Board of the HOA until September of 2008, and made a number of repairs in response to owner complaints. (R. pp. 1460 -1462). Mr. Thoennes specifically testified that during the operative time, he was wearing a number of hats, including contractor, head of the sales department for IMK, and, to some degree, a member of the HOA Board. (R. p. 1461-1462). Mr. Thoennes refused to admit that he communicated information regarding the repairs requested of him while wearing his "contractor hat" to the homeowners' association. (R. p. 1457-1460).

Plaintiff further offered the expert testimony of Derek Hodgin, P.E., who testified 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 only remaining defendants were the contractors for Bostic and Marick, IMK, IK, Cox, Lollis and Thoennes. On November 8, 2013, the jury returned a verdict in favor of the Plaintiff in the amount of $5,000,000 on three causes of action: negligence against Bostic and Marick, breach of warranty of service against Bostic and Marick and breach of fiduciary duty against IMK, IK, Thoennes, William Cox and Larry Lollis. (R. pp. 29-35). At the request of Defendants, the Court allowed apportionment of the awards under the negligence and breach of warranty causes of action. After deliberating, the jury allocated sixty percent (60%) of the negligence award to Bostic and forty percent (40%) to Marick and allocated seventy percent (70%) of the breach of warranty award to Marick and thirty percent (30%) to Bostic. (R. p. 36). No allocation of any kind was requested with respect to the breach of fiduciary duty award.

After the jury rendered its verdict, but before allocation 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 as follows:

> Well, the way the Defendants have been treating it, yes, it is cumulative because they've been treating them all as separate little things that they want – what is it? – apportionment on this one and apportionment on that one.

(R. pp. 2055-2056; R. pp. 2090-p. 2093). Again, 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 merely argued their positions with respect to apportionment. The jury was released after deciding the apportionment issue without anything further being requested by any defendant.

On November 8, 2013, the Court entered a Form 4 order of judgment. (R. p. 29-36). Plaintiff filed a Motion to Alter or Amend Judgment seeking to have the full amount of the cumulative judgment award, $5,000,000, assigned to each of the causes of action. (R. pp. 2194-2197; R. pp. 2757-2759). By letter dated November 25, 2013, Plaintiff clarified the prior settlement amounts $2,855,911.77 received from defendants for Phase I damages and asked that the full set-off be applied to each cause of action, reducing the amount awarded for each cause of action to $2,144,088.23. (R. pp. 2757-2759). None of the defendants objected to the amount of prior Phase I settlements as set forth in the letter.

As requested in Plaintiff's Motion to Alter or Amend and letter dated November 25, 2013, the trial court entered a Form 4 Judgment filed January 30, 2015, amending its prior Form 4 Judgment filed November 8, 2013, and applying a set-off for the amounts recovered by the Plaintiff from the settling defendants. (R. pp. 41-43).

ARGUMENTS

I. Bostic's arguments misconstrue the law regarding set-off and the South Carolina Contribution Among Tortfeasors Act.

The HOA is entitled to and has for five years attempted to collect a total of $2,144,088.23 from any or collectively from all of the defendants remaining at the end of the Phase I trial. That amount —$2,144,088.3 — is the cumulative $5,000,000 verdict for one damage reduced (set off) by the total amount Plaintiff received in settlement funds from other defendants ($2,855,911.77) prior to trial. The trial court applied the full damage amount the jury awarded to each cause of action and also gave the defendants the full benefit of a reduction by the entire amount collected from the settling defendants on each cause of action. As the HOA argued in its initial brief filed

September 9, 2009, the HOA requests that this Court reinstate the verdict and application of the setoff as the trial judge determined. In the event this Court disagrees, the HOA addresses Bostic's arguments regarding the verdict and setoff below.

A. A non-settling defendant's right to a set-off does not arise solely from S.C. Code Section 15-38-50.

Bostic seeks to have the setoff applied only to the negligence cause of action based upon Bostic's argument that the South Carolina Contribution Among Tortfeasors Act (the "Act") provides the only basis for setoff and the negligence cause of action was the only cause of action "in tort" pursuant to the Act. If this Court agrees with the HOA and the trial court that the full $5 million cumulative damage award should be applied to each cause of action, then application of the set-off on one cause of action only is inconsequential to the HOA. However, if this Court agrees with the Court of Appeals that the damage award should be divided among the causes of action, the HOA argues the set-off should be divided across the three causes of action.

"The right to setoff has existed at common law in South Carolina for over 100 years." *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015). Although equitable principles of setoff are codified as part of the South Carolina Contribution Among Tortfeasors Act, the Act *is not* the sole basis for a non-settling defendant's right to a set-off and a common law right to a set off exists. *See id.* Because the right to setoff is part of the common law of South Carolina, whether breach of implied warranty claims or breach of fiduciary duty claims are tort claims or are subject to the Act, as Bostic argues, is of no moment. Likewise, Bostic's argument that the set-off should be applied only to the negligence cause of action because it is the only tort claim is without merit.[3]

[3] However, if the Court determines that the breach of implied warranty claim is a tort claim and not subject to the Act, then Bostic should not be entitled to an apportionment reduction pursuant to S.C. Code Ann. § 15-38-15, which is another provision of the Act.

B. There is no basis for a determination that settlement proceeds should be set-off on one cause of action and not another.

In this case, the damages the HOA sought the same relief under each cause of action. Bostic cites to cases involving wrongful death and survival claims. Wrongful death claims and survival actions are different claims for different injuries. The issue that arises in that context is whether a settlement between the Plaintiff and one party that allocates all or a portion of the settlement to the survival action, for instance, may entitle the non-settling defendant to a set-off on the other claim, i.e. the wrongful death claim, because those claim involve different damages. *See id.*

In this matter, the HOA and the settling parties did not assign the settlement to a certain claim or cause of action because all of the HOA's claims sought compensation for the same damage – the cost to repair the defectively constructed townhomes. The phase I settlements included subcontractors, architect and developers who collectively had potential for liability under each of the causes of action asserted at trial (including breach of fiduciary duty and breach of implied warranty), as well as professional negligence. (R. pp. 2757-2759). Following the verdict, the trial judge determined that the cumulative damage award applied to each cause of action and likewise that the set off applied (cumulatively) to each cause of action.

There is no basis for Bostic's argument that the set off should be applied in a manner that benefits it, and there is likewise no basis for the Court of Appeals deciding not to apply a portion of the setoff to the fiduciary duty cause of action. First, there is no basis for Bostic's request to receive the benefit of the monies paid by settling defendants on the negligence claim only. Recall that pursuant to S.C. Code § 15-38-15, the jury allocated 60% fault to Bostic on the negligence claim. Bostic asks this Court to first agree with the Court of Appeals' decision to change the judgment as entered by the trial court and begin with $3 million (not the cumulative $ 5 million)

as to the negligence cause of action. Then it wants this Court to reject both the trial court and the Court of Appeals and apply the entire setoff amount only to the negligence cause of action because it argues the principles of setoff contained in the Act only apply to negligence. The right to setoff is not exclusive to the Act and there is no reason to apply the cause of action over the other. Additionally, and as argued in its initial brief filed September 9, 2019, for the same reason stated above, there is no basis for the Court of Appeals' determination that none of the settlement proceeds should be set off against the breach of fiduciary judgment.

C. Bostic ignores the plain language of the Act in its calculations and repeatedly argues the verdict on the negligence cause of action should be reduced against it based on S.C. Code 15-38-15 although Bostic was allocated more than 50% of fault.

Bostic asks this Court to ignore the plain language of S.C. Code § 15-38-15 and hold it responsible for only 60% of the judgment after setoff (see Brief of Respondent-Petitioner, page 9) even though the plain language of S.C. Code § 15-38-15 only allows a reduction for a defendant whose conduct is determined to be less than fifty percent of the total fault and Bostic was allocated 60% of the fault for negligence and is therefore responsible for 100% of the verdict. *See* S.C. Code Ann. § 15-38-15 ("A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact."). Finally, it wants this Court to ignore any effect of S.C. Code Ann. § 15-38-15(E), which would only allow it the benefit of set-off in proportion to its percentage of liability as determined pursuant to subsection (C).

D. The Court of Appeals did provide a holding as to judgment against Bostic.

Bostic argues that the Court of Appeals failed to provide a holding against Bostic and that it is silent as to the judgment against Bostic. This is incorrect. Although Bostic may disagree with

the holding, the Court of Appeals did in fact provide a holding as to Bostic. In Opinion 5601, the Court of Appeals remanded for entry of judgment consistent with its opinion in Opinion No. 5600. In its Opinion No. 5600 ("Stoneledge I"), the Court of Appeals noted that the jury verdict provided a $5 Million damages award with $3 Million being applied to the negligence cause of action, and $1 Million being applied to each of the breach of implied warranty and breach of fiduciary duty causes of action. In Stoneledge I, the Court of Appeals noted that in an additional proceeding to apportion fault (pursuant to S.C. Code15-38-15), the jury apportioned 40% of fault to Marick on the negligence claim, which left 60% of fault to Bostic; and it apportioned 70% of fault to Marick on the breach of implied warranty cause of action, which left 30% of fault on Bostic.

The Court of Appeals then held that the trial court invaded the province of the jury by finding that each cause of action independently supported a $5 Million verdict. The Court of Appeals reapportioned the setoff by saying it did not apply to the fiduciary duty claim (which the HOA contends was legal error). The Court of Appeals deducted the amount of the prior settlements, applying three quarters of that amount to the award for negligence and one quarter to the award for breach of warranty. The Court of Appeals determined that $1,608,066.17 remained as to the negligence cause of action and $536,022.06 remained as to the breach of warranty claim. In this way, the Court of Appeals provided a holding as to Bostic. That is, since Bostic was adjudicated 60% responsible for the negligence award, pursuant to S.C. Code Section 15-38-15, it is liable for 100% of the negligence award for a total of $1,608,066.17. Since Bostic was found 30% responsible for the warranty claim, pursuant to S.C. Code Section 15-38-15, Bostic would be responsible for 30% on the breach of implied cause of action for a total of $160,806.62.

II. The Court of Appeals properly upheld the trial court's denial of Bostic's directed verdict motion.

In substance, Bostic argues that although it did not request a jury charge on its statute of limitations defense at trial, the only reasonable inference from the evidence is that the Plaintiff's claims were time barred. As an initial matter, Bostic's spin on the Court of Appeals' ruling on the statute of limitations is inaccurate. The Court of Appeals did not hold, as Bostic asserts in its brief, that the statute of limitations was tolled until repairs failed. The Court of Appeals did properly affirm the trial court's denial of Bostic's directed verdict motion because applying the proper standard of review, the Court of Appeals *could not determine that either* "no evidence supports the trial court's decision, or the ruling is controlled by an error of law." *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 188-89, 691 S.E.2d 170, 173 (Ct. App. 2010). "The trial court must deny a directed verdict motion when the evidence yields more than one inference, or its inference is in doubt." *Id.* "When considering a directed verdict motion, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.*

A. On these facts, whether the Plaintiff knew or should have known it had a cause of action was a jury question.

Section 15–3–535 of the South Carolina Code provides that, "Except as to [medical malpractice actions], all actions initiated under Section 15–3–530(5) must be commenced within three years *after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.*" S.C. Code Ann. § 5-3-535. (emphasis added). The standard is stated in the statute. When the evidence is conflicting or is capable of more than one reasonable inference, whether the plaintiff knew or should have known that it had a cause of action is a jury question. *See McAlhany v. Carter*, 415 S.C. 54, 63–64, 781 S.E.2d 105, 110 (Ct. App. 2015), aff'd, No. 2016-000405, 2017 WL 4873655 (S.C. May 3, 2017). Moreover, a jury must also resolve factual issues when there is a dispute as to whether an owner may have known about certain

defects and damages and not others. *See Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 185, 708 S.E.2d 787, 794 (Ct. App. 2011).

The record in this case contains questions of material fact regarding when the HOA should have known, through the exercise of reasonable diligence, that a cause of action against Bostic. All homeowners are members of the HOA by virtue of their ownership. The HOA Board primarily conducts its business. In arguing that the HOA's claims are time-barred as a matter of law, Bostic relied upon testimony at trial that after Bostic abandoned the Project in 2004, and during the period when the second developer, IMK, controlled the HOA Board, two Phase I owners, Steve Taylor and Bob White, reported certain problems with their units to Rick Thoennes (principal of Marick and also IMK). Bostic asserts that the HOA was then charged with Thoennes's knowledge of defects, and such knowledge was sufficient to commence the running of the three-year statute of limitations as a matter of law.

It is generally a question of fact whether notice of a problem is sufficient to put a person on notice of a cause of action. In addition to the facts set forth above, Mr. White and Mr. Taylor consistently testified that neither of them believed, until 2009, that any of the conditions reported to Thoennes gave rise to a legal claim. (R. p. 1367, line 25-p. 1368, line 13; R. p. 1345, line 4-p. 1346, line 3). Mr. White and Mr. Taylor also both testified that certain latent deficiencies were not discovered until 2009, when a report of a handrail failure in the unit of owner Jim Logan, revealed severe rot and deterioration behind the stone facade. (R. p. 0606, line 14-p. 0607, line 19; R. p. 1345, line 4-p. 1346, line 3). It was at that point, for the first time, that anyone from the HOA testified that they were aware of the deficiencies. (R. pp. 0606, line 14-p. 0607, line 19; R. pp. 1345, line 4-p. 1346, line 3). In support of the contention that the owners first learned of the severity of latent deficiencies after discovery of the problem at Logan's unit, at that time the HOA,

controlled by the owners for a mere six or seven months, retained the services of an engineering firm, the Warren Group, to investigate what they believed at that point to be a structural problem at Phase I. This action was commenced on May 29, 2009, just six months after control of the HOA was turned over to the owners.

Further, while there were reports of problems from the early owners of Phase I units before 2009, those problems were addressed by Thoennes and Marick, to the apparent satisfaction of the owners, based upon what they knew at the time. Moreover, these problems did not and could not (and should not) have placed the individual owners or the HOA as an entity on notice of latent defects. For instance, Mr. Taylor testified that while Marick was onsite from 2005 to 2008, he was not aware of defects to deck columns; roofing defects; foundation leaks; problems with the stonework; or problems with the windows. (R. p. 0624- 0625). All of this testimony, taken in the light most favorable to the Plaintiff, supports an inference that neither the HOA as a whole or the individual owners were aware of or should have been aware of a cause of action for defective original construction prior to February 2007 (three years before Bostic was added as a defendant).

The HOA *should not be charged* with information provided to Thoennes for a number of different reasons. First, it is undisputed and Thoennes specifically testified that during the operative time, he had a number of roles at Stoneledge. Despite a vigorous cross-examination by Bostic's counsel, Thoennes refused to admit that he communicated information regarding the repairs requested of him or Marick to the HOA Board. (R. p. 1457, line 23-p. 1458, line 22; R. p. 1459, line 20-p. 1464, line 8). Second, the jury found that Thoennes and IMK were liable to the HOA for breach of fiduciary duty.

B. There was evidence to support the trial court's denial of Bostic's directed verdict motion.

The Court of Appeals properly held the trial record contained "some evidence these latent defects could not have been discovered through the exercise of reasonable diligence until 2009 at the earliest." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 425 S.C. 268, 275, 821 S.E.2d 504, 508 (Ct. App. 2018), reh'g denied (Dec. 13, 2018), cert. granted (Aug. 6, 2019) (Opinion No. 5601, at *5). There was conflicting evidence as to whether and when the HOA knew or by the exercise of reasonable diligence should have known it had a cause of action regarding construction defects in a development of thirty-seven townhomes (just in Phase I). Because there was evidence to support the trial court's decision to deny Bostic's directed verdict motion, the Court of Appeals, mindful of the standard of review, properly affirmed the trial court's denial because there was evidence to support it.

In *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989), the Supreme Court ruled on the statute of limitations in a case involving latent defects. In *Santee*, the plaintiff had a cement storage complex installed in 1965 that included twelve concrete silos and three bins. *Id.* at 693. In 1969, a small crack was discovered in one of the bins, which was repaired. *Id.* In 1975, another crack appeared in the same bin. *Id.* at 694. The complex was inspected at this point, and the bin was again repaired at a relatively small cost. *Id.* In 1980, two individuals were killed when a second storage bin collapsed. *Id.* A subsequent investigation revealed that the bin, as well as the twelve silos, were structurally unsound because steel reinforcement rods had been improperly spaced and tied together. *Id.*

The plaintiff brought suit against the general contractor responsible for the construction of the cement plant. The trial court concluded that the plaintiff knew or should have known that it had a cause of action against the contractor when the first crack appeared in 1969, or at least when the second crack appeared in 1975. *Id.* at 695. The South Carolina Supreme Court disagreed and

noted the plaintiff had introduced expert testimony as to the latency of defects in the silos, noting that the rods were inside concrete walls, and hence undiscoverable. *Id.* at 696. Moreover, there was evidence repairs were performed. *Id.* The South Carolina Supreme Court concluded that the evidence introduced "went to the reasonableness of [the plaintiff's] actions, which was an issue to be decided by the jury." *Id.* (*citing Brown v. Finger*, 240 S.C. 102, 124 S.E.2d 781 (1962)).

The *Santee* case is cited in support of *Centex Homes v. S. Carolina State Plastering, LLC,* No. 4:08-CV-2495-TLW, 2010 WL 2998519 (D.S.C. July 28, 2010). In *Centex Homes*, Judge Wooten held that although the question was close, the record contained questions of material fact regarding when Centex should have known, through the exercise of reasonable diligence, that a cause of action existed against several of its subcontractors for alleged construction defects associated with a condominium complex. *Id.* On June 20, 2001, Building 3 was the first building to be completed at the condominium complex, and Building 1 was completed on April 29, 2002. In 2002, Centex discovered water damage to Building 3, which was thought to have been caused by water intrusion at the intersection of the deck and outside walls. Two subcontractors participated in repairs performed in 2002 to address the damage, which included the installation of kickout flashing at the intersections. Centex did not add the kickout flashing to Building 1, which was a similar building. In 2006 Centex discovered water damage in Building 3 and in Building 1. Again, it was thought to be caused, at least in part, by water intrusion at the decks. Between 2006 and 2007 Centex made repairs and filed suit against several subcontractors. The subcontractors moved for summary judgment on the statute of limitations.

Centex argued the water damage to Building 1 could not be attributed in total to the lack of kickout flashing, and that damage to Building 3 continued despite the addition of kickout flashing. Centex argued there were multiple factual issues including the cause of the damage;

whether the existence of latent defects prevented discovery of the defects and of the allegedly defective workmanship. The Court found that the determination of whether Centex, through the exercise of reasonable diligence, should have discovered these alleged deficiencies prior to 2006 was an issue properly resolved by the finder-of-fact. *Id.* at *8.

In this case, a question of fact existed as to when the HOA was on notice of defects sufficient to commence the statute of limitations. Another question of fact existed as to which, if any, of the defects and damages for which the HOA asserted claims may have been known or could have been known to the HOA more than three years prior to the filing of the lawsuit. Based on the factual issues, the trial court properly denied Bostic's motion since it could not rule, as a matter of law, that the statute of limitations had expired more than three years before the claim was filed. The Court of Appeals properly affirmed because there was evidence to support the trial court's ruling. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006) ("The appellate court will reverse the trial court's ruling on a directed verdict or JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law.") Bostic failed to submit the question of when the HOA knew or should have known of a claim to the jury and has thereby waived any right to have the issue determined by the trier of fact.

C. Bostic's additional arguments are unavailing.

Bostic essentially argues that the knowledge of Marick and Thoennes is imputed to the Plaintiff and the Plaintiff is responsible for their actions or inactions. Bostic argues Plaintiff's expert Hodgin testified certain conditions on one unit would have put a licensed general contractor on notice that additional investigation was required. Mr. Hodgin's testimony at trial is contained in the record beyond what Bostic cites. (R. p. 1042-1050). Mr. Hodgin's testimony goes to the standard of care of a licensed general contractor such as Marick. The HOA is not a licensed general contractor and is not synonymous with Marick.

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

Finally, Bostic asks the Supreme Court to decide the issue of equitable tolling. On review, the South Carolina Court of Appeals declined to address the issue regarding the equitable tolling of the statute of limitations.

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

Bostic essentially argues that the statute of limitations began to run as to the HOA upon its enactment in November 2005. At that time, Bostic argues, any defect known by IMK, the developer, was chargeable to the HOA for purposes of the statute of limitations, meaning that the second developer, IMK, let the statute of limitations expire, thus precluding the claims of the owners who now control the HOA. This is so, Bostic argues, notwithstanding the fact that the owners who now control the HOA had no ability to assert those claims until September of 2008 and acted promptly upon assuming control of the HOA at that time.

The result urged by Bostic is anathema to the public policy of South Carolina, as established through its construction defect law, which clearly seeks to protect owners of residential property from defective construction and developers with conflicts of interest, by arming them with the tools to protect their interests.

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

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

There is authority, however, which provides that the court has the equitable power to toll the statute to prevent a gross injustice. As the Court of Appeals recognized in *Magnolia North v Heritage Communities*, the equitable power of a court exists to do fairness and is flexible. *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012) (*quoting Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 114, 687 S.E.2d 29, 32 (2009)).

It would be manifestly unfair to rule that the statute of limitations began to run years before the owners assumed control of the association — during which time the board was controlled by IMK, whose interests were actually adverse to the owners who comprise the current HOA. The trial court correctly held that the statute of limitations did not begin to run before these owners were given control of the HOA.

CONCLUSION

The HOA respectfully requests 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 or breach of warranty cause of action. The HOA further asks this Court to affirm the trial court's denial of Bostic's directed verdict motion on the statute of limitations, which was properly affirmed by the Court of Appeals.

Respectfully submitted,

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October 18, 2019

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

PROOF OF SERVICE

I certify that I have served the Petitioners-Respondents' Reply Brief on counsel for the Respondent-Petitioner by depositing a copy in the United States Mail, First Class postage prepaid, this 18 day of October 2019, addressed to the following:

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