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, Circuit Court Judge

Appellate Case No. 2019-000038
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; 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 Enterprize 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.

RESPONDENTS' BRIEF ON BEHALF OF PETITIONERS-RESPONDENTS

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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 Marick Home Builders, LLC and Rick Thoennes filed following a Phase I jury trial and verdict in favor of the HOA. Bostic Brothers Construction, Inc. ("Bostic") filed a separate appeal, now Appellate Case No. 2019-000041, following the verdict.

In 2002, 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. In 2005, IMK Development Company ("IMK") purchased the Project and Marick Home Builders, LLC ("Marick") took over construction. (R. pp. 1322 –1324.) IMK was comprised of Marick and Integrys Keowee Development LLC ("IK"). (R. p. 1324.) The principals of IK included William Cox and Larry Lollis. (R. pp. 1323 – 1324.) Rick Thoennes ("Thoennes") was the license holder and principal of Marick. (R. p. 1355, ll. 23 – 25.) In addition, Thoennes had multiple other roles in the Project. (R. pp. 1361– 1364; R. p. 1372; R. pp. 1377– 1386.)

Plaintiff filed suit in 2009 and 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, upon the motion of certain subcontractor defendants, Judge Macaulay, issued an Order for Separate Trials and Scheduling Order ("Separate Trials 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. 1 – 10.)[1] The trial court entered the Separate Trial Order based on arguments including 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 beginning 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 to the Project and the estimated future cost to repair. (R. pp. 1866-1867; 1870 – 1871.) On November 8, 2013, the jury returned a verdict of liability on three causes of action: negligence against Bostic and Marick/IMK; breach of warranty of service against Bostic and Marick/IMK; 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. (R. pp. 29 – 35.)

Immediately after the jury's verdict was announced, but before allocation and while the jury was still empaneled, counsel for the HOA asked the Court if the award was cumulative. (R. pp. 1977 – 01980). In response, with no objection or inquiry from counsel for any defendant, the Court ruled the award was cumulative. (R. p. 1979, l. 8 – p. 1980, l. 18.) No defendant objected to that ruling or requested that an inquiry be made of the jury on that issue while the jury was empaneled. Instead, the defendants proceeded to argue their positions with respect to apportionment. At the defendants' request, the trial court allowed apportionment pursuant to S.C. Code § 15-38-15 under the negligence and breach of warranty causes of action. (R. p. 1977.) 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

1 The record on appeal begins on page 87 of the Appendix.

Bostic. (R. p. 32.) Once the jury decided that issue, the jurors were released with the consent of the defendants. (R. p. 1979 – 1998.)

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 cause of action. (R. pp. 2324-2329.) 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.[2]

Judge Macaulay presided over a hearing on all post-trial motions on April 10, 2014. (R. pp. 110 – 215.) 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. p. 36-38.) As to the cause of action for negligence against Marick, the court entered judgment of $857,635.29 (40% of $2,144,088.23). As to Plaintiff's breach of warranty cause of action against Marick, the court entered judgment of $2,144,088.23. As to the claim for breach of fiduciary duty against IMK and Rick Thoennes, the court entered judgment in favor of Plaintiff in the amount of $2,144,088.23.3

Bostic and Marick/Thoennes filed separate appeals. The Court of Appeals issued opinions in both appellate cases on October 10, 2018. In this appellate case, the Marick/Thoennes 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*, Opinion No. 5600, 425 S.C. 276, 301, 821 S.E.2d 509, 522 (Ct. App.

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2 There was no objection from the defendants to the amount of the settlement. The letter regarding the settlements was inadvertently left out of the Marick record. It is included in the Bostic appeal record (Bostic R. p. 2752, Appendix Exhibit F.)

3 The amount of the judgment against Marick was not reduced on the warranty cause of action based on S.C. Code § 15-38-15 because the jury determined Marick was more than 50% at fault. As to the negligence cause of action against Bostic, the court entered judgment of $2,144,088.23. As to Plaintiff's breach of warranty cause of action against Bostic, the court entered judgment of $643,226.47 in favor of Plaintiff.

2018) (App. 3450). The Court of Appeals also issued *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, Op. No. 5601 in the Bostic appellate case, which incorporated Opinion No. 5600. Marick/Thoennes (as did Bostic) filed their Petition for Rehearing. (App. p. 3471.) The HOA also filed petitions for rehearing in both appellate cases. (App. p. 3485.) The Court of Appeals denied the parties' respective Petitions for Rehearing by Order dated December 13, 2018. (App. p. 3494.) Marick/Thoennes 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 FACTS

Stoneledge was developed and constructed in two phases. Phase I consists of eight (8) buildings representing thirty-seven (37) individual units. Bostic Brothers constructed numerous units in Phase I, and the remaining units were in various stages of completion when Bostic ceased construction and ultimately entered into bankruptcy. (R. p. 632; R. p. 635, line 23 – p. 636, line 2; R. p. 1365.)

After Bostic left the project, on or about March 30, 2005, Keowee Townhouses, LLC sold the Project, including unfinished units in Phase 1, to Defendant IMK, a company comprised of defendants Marick and IK (R. p. 1323-p.1325). Marick and its license holder Thoennes, assuming the role of general contractor, obtained 26 new building permits, and began work on Phase I in 2005. (R. pp. 681 – 682; R. pp. 714 –722; R. pp. 1362-1363; R. p. 959; R. pp. 2738 –2759.) Rick Thoennes assigned Nathan Hornaday as the Superintendent for the Project. (R. p. 680.) Marick and Thoennes performed extensive work at the project to complete the build-out of Phase I. (R. p. 714, line 24 – p. 722, line 20; R. pp. 2738 – 2759.) To complete the units in Phase I, Marick was required to pull a number of building permits. (R. pp. 681 – 682; R. pp. 714 –722; R. pp. 1362-

1363; R. p. 959; R. pp. 2738 –2759). On the building permits, Marick represented the nature of the work it was going to undertake and assigned a value to that work. (R. p. 680 – 682; R. pp. 714 – 722; R. pp. 2738 – 2759.) The descriptions of the work ranged from completion of the interior of certain units to completion of other units "from the foundation up," and for various stages of work in between. (R. pp. 714 – 722; R. pp. 2738 – 2759.) The value of the work to be performed pursuant to the permits, as estimated by Marick, was more than $1.4 Million. (R. pp. 2738-2759; R. p. 00714, line 24 – 722, line 20; R. p. 1363, line 19 – p. 1364, line 11.) To pull the permits, Marick had to certify that the work it was going to perform would comply with applicable building codes and ordinances.

Through his company, Marick, Thoennes also performed a number of repairs to units in Phase I including re-waterproofing the concrete decks and balconies in response to owner complaints. (R. p. 714, line 24 –722, line 2; R. p. 01367.)

IMK named Rick Thoennes, William Cox, and Tim Roberson as board members of the HOA. (R. p. 432 – p.438; R. p.519; R. p. 01326, line 2-10; R. pp.2471; R. pp. 02472-2569.) IMK remained in control of the board of the HOA until September 2008. (R. p. 432-433; R. p. 2471.) At that time, control of the board was turned over to the owners who, collectively through the HOA, are the Plaintiffs in this action. Thoennes, a licensed general contractor and managing member of Marick, sat on the board of the association until September of 2008. Mr. Thoennes specifically testified that during the operative time, he was wearing a number of hats, including that of contractor, head of the sales department for IMK, and, to some degree, a member of the board. (R. pp. 1385-1386.)

Respondent's expert Derek Hodgin provided expert testimony about the various construction defects at the Project. (R. pp. 859-1139; R. pp. 2901-3222). Hodgin developed a scope of repair for the defects and damages he discovered in Phase I (R. pp. 2901-3192), and the HOA presented

evidence of the cost to repair 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. 1870-1871; R. pp. 3223 – 3224 (App. p. 3365); R. p. 3303 (App. p. 3445)).

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 Brothers' expert, Rick Moore, admitted that the Project had pervasive water infiltration, rot and deterioration resulting from the contractors' failure to properly construct the Project. (R. p. 1603– 1604; R. p. 1605; R. pp. 1659 – 1676.) Bostic's expert Steve Watkins estimated a cost of $3,995,106.34 to implement Hodgin's scope of work (not including the cost for contract administration which Watkins agreed was necessary), and a cost of $2.47 million to implement the defendant's reduced scope of work. (R. pp. 1236 – 1237; R. pp. 1241 – 1245; R. pp. 3225 – 3226; R. pp. 1703 – 1707; R. pp. 1721-1724; R. p. 1728, line 9-p. 01729, line 18.) Marick did not offer expert testimony on any subject in the Phase I trial.

At the close of the Phase I trial, the remaining defendants were Bostic, IMK, IK, Marick, Thoennes, Cox and Lollis. 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 the apportionment phase of the trial, and while the jury was still empaneled, counsel for the HOA asked the Court if the jury's 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. p. 1979, line 8 – 1980, line 18; R. p. 120, line 5 – 123, line 8.) Again, no Defendant objected to that ruling or requested any inquiry of the jury on any issue. Instead, after the court's ruling that the verdict was cumulative, 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. (R. pp. 1979-1998.)

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. 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. 36 – 38.)

ARGUMENT

I. The Court of Appeals properly affirmed the trial court's decisions regarding jury instructions because taken as a whole the charges adequately instructed the jury on the law of South Carolina.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion." *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 197, 781 S.E.2d 534, 542 (2015). Although requested, "the trial court is not required to instruct the jury on a principle of law that is irrelevant to the case as proved." *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). Moreover, even if the trial court erred in failing to give a requested instruction, the requesting party also must show that the error was prejudicial to warrant reversal on appeal. *Id.*

a. A charge from the *Roundtree Villas* case was inapplicable.

As it has argued for years, Marick now asks this Court to hold that it was not a contractor for Phase I and to limit its liability to that of a "lender" with no involvement in construction or repair based on *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (1984). Marick contends that Bostic and only Bostic can be held liable for the faulty work in Phase I. In making the argument, Marick continues to misstate the claim asserted against it and to ignore the evidence presented at trial.

Marick was not sued because the HOA wanted to impose Bostic's liability vicariously on Marick. Also, the HOA does not contend Marick is a warrantor of Bostic's work. Instead, and quite clearly, Marick was sued for its own negligence and breaches of warranty with respect to the significant work it did in developing and constructing Phase I.

The facts of this case establish that Marick stepped into the Project after it was abandoned and left incomplete by Bostic. Bostic completed a portion of the units, and Marick undertook to complete the vast majority of the units before selling them, through IMK. Before doing that work, Marick pulled *new building permits* for the incomplete units, representing that it was to perform $1,400,000 worth of construction to complete the units. Marick also undertook to perform extensive repairs. (R. pp. 02738-02759). While Marick now says those permits were "misstated," the permits Marick secured were submitted as evidence at trial and establish Marick's role in Phase I was not that of a lender making repairs. The evidence at trial also supported a finding that Marick was aware of potential problems and negligently failed to investigate or correct those problems, opting instead to simply sell the units to members of the public who became owners and members of the HOA. (R. p. 00680, line 7 – 00682, line 25; R. p. 00714, line 24 – 00722, line 20),

The Supreme Court's opinion in *Kennedy v Columbia Lumber*, 299 S.C. 335, 384 S.E.2d 730 (S.C. 1989) is determinative of the issues Marick raises. In *Kennedy*, the Supreme Court discussed and noted that in *Roundtree*, a lender that monitored construction to protect its loan interest was not liable under those facts for the faults of the contractor. "The monitoring by the lender was not enough to impose a legal duty on it to prevent construction defects." *Id.* at 733. For purposes of this case, and contrary to Marick's argument, the *Kennedy* court went on to note that in Roundtree: "We agreed, however that a duty on the lender to use due care did arise regarding the repair work it undertook." *Id.* The proposition is simple: where a party does not actively perform work, it may not be responsible for it, but a party is and always has been responsible for the work it did perform and for work that it did not perform but should have performed. That is why Marick was sued for negligence and breach of implied warranty of service for Phase I.

b. Taken as a whole, the "liability charge" adequately instructed the jury on the law of South Carolina.

The combined charges adequately instructed the jury on the law.[4] As the Court of Appeals noted, the trial court instructed the jury on the general elements of negligence and continued by instructing the jury on proximate cause. (App. pp. 3456 – 3457) (R. pp. 1941 – 1944; App. pp. 2059 – 2062.) The charges on the elements of negligent construction including an instruction that the negligence in performing the construction work must be a proximate cause of the damages sustained by the plaintiff. As the Court of Appeals also noted, the instructions on proximate causation included instructions on concurring cause. (R. p. 1951; App. p. 2069.) *See Atl. Coast Line R. Co. v. Whetstone*, 243 S.C. 61, 67, 132 S.E.2d 172, 174 (1963) ("An injured person can sue any one or all of several joint tort-feasors whose negligent acts or omissions unite to produce his injury."); *see also Matthews v. Porter*, 239 S.C. 620, 627, 124 S.E.2d 321, 324 (1962) (referencing the rule "when an injury occurs through the concurrent negligence of two persons, and it would not have happened in the absence of the negligence of either person, the negligence of each of the wrongdoers will be deemed a proximate cause of the injury, although they may have acted independently of one another; and both are answerable...") (citations omitted). If Marick's acts combined with that of Bostic to result in a single harm to the HOA, Marick and Bostic are both liable for the damage. Moreover, as noted throughout this brief, Marick had an advantage that the lender in *Roundtree* did not based on its apportionment arguments. *See* S.C. Code Ann. § 15-38-15. Thus, the arguments that Marick now makes were considered and weighed by the jury, and Marick has suffered no harm by submission of this case to the jury despite the fact that it was the second, not the first, contractor to cause harm to the HOA.

c. Any reference in the instructions to the implied warranty of habitability was not error and harmless because no cause of action for breach of the implied warranty of habitability was included on the verdict form.

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4 Although the Court of Appeals rejected the argument, the HOA maintains Marick failed to preserve its argument because the requested charge is not included in the court's record.

Marick continues to argue that the trial judge improperly charged the warranty of habitability. "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (citations omitted). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *Id.* In this instance, reference to the warranty of habitability was isolated, and the charges as a whole were "reasonably free from error." As Marick's counsel and Judge Macaulay noted, reference to habitability was made once and "buried" in the general charge on implied warranties. (R. p. 1960, line 7-20; R. p. 1971.) After the jury began deliberating, the trial court received a request from the foreman to provide the charge on breach of warranty of workmanlike service and breach of fiduciary duty. (R. p. 01962.) The trial judge informed counsel that he would bring the jury in and reread the requested charges. Marick's counsel did not object and thereby waived this argument. (R. pp. 01962-01963.)

Even if the reference was in error, Marick cannot show prejudice. First, Marick cannot demonstrate prejudice for the reasons stated above. Second, there is no prejudice because the verdict form did not include a cause of action for breach of the warranty of habitability, and the jury never awarded a verdict against Marick for breach of the warranty of habitability. (R. pp. 29-31.). Finally, Marick argues in its Brief (Brief of Respondents-Petitioners p. 13) that inclusion of the instruction was prejudicial due to closing arguments made by Bostic's counsel. This argument is disingenuous because the referenced quote from the argument of Bostic's counsel was during its *apportionment argument*, and after the jury returned a verdict. (R. p. 1987-1988; App. pp. 2105-2106). Further, Marick never objected to counsel's closing and has not preserved the issue. (R. p. 1989 – 1990).

II. The Court of Appeals did not err in affirming the trial court's denial of Marick's directed verdict motion.

a. The evidence at trial was sufficient to overcome Marick's directed verdict motion on Plaintiff's cause of action for breach of implied warranty of workmanlike service.

As with its "liability charge" argument, Marick takes the position that the implied warranty of workmanlike service does not apply to it because it was not the contractor for Phase I. This argument is contrary to the applicable law and flies in the face of the evidence presented at trial, which is clear and overwhelming that Marick actually performed extensive work in Phase I. Submission of the breach of implied warranty cause of action to the jury was appropriate and supported by the evidence.

Bostic left the Stoneledge Phase I project in 2004. The evidence at trial indicated that when IMK and Marick arrived at the project, Phase I was largely in disrepair, having been vacant for the period of time (R. pp. 513 – 515 (App. pp. 615 – 616); R. pp. 00715 – 716 (App. pp. 817 – 818).) Marick then undertook to repair the damaged condition of the Phase I units and to complete the remaining units. As noted previously, the work described in the building permits Marick requested and received ranged from punch work in some units to work from the "foundation up" in other units. (R. pp. 2738 – 2759 (App. pp. 2872 – 2893).) The value of the work to be performed pursuant to the permits, as Marick estimated, was more than $1.4 Million. (R. pp. 2738-2759 (App. pp. 2872 – 2893); R. p. 714 – 722 (App. pp. 816 – 824).) Thus, Marick indisputably performed a substantial amount of work to the unfinished units in Phase I.

Marick also undertook to make repairs to Phase I units when early owners of those units had complaints. This included waterproofing repairs to the porches and decks (which were later discovered to be completely rotted) and to the foundation walls (which continued to leak). (R. pp. 697-698; R. pp. 74401139.) Derek Hodgin, Respondent's expert, testified that those repairs failed to

correct the deficiencies. (R. pp. 744-1139).

Though there was conflicting testimony between the witnesses, there was evidence Marick's superintendent was aware of construction deficiencies or omissions at the time it assumed responsibility for the Project. (R. pp. 683-723). This is supported by the conditions Hodgin observed in two units that were incomplete when he performed his investigation in 2009. At trial, photographs of those units, taken in 2009, were presented to Mr. Hornaday who testified that he observed conditions similar to those in the photographs when he was on site. (R. pp. 704-709; R. pp. 2091-3192; R. pp. 2804-2884). Those photographs show extensive staining from water infiltration around windows and doors on the backside of the exterior sheathing. The photographs and Hornaday's testimony support a conclusion by the jury that Marick's superintendent knew of needed repairs and failed to make them or failed to properly complete construction.

Those photographs also showed evidence that the interior fire-rated walls were not properly constructed. Though Nathan Hornaday testified the building official directed Marick to correct the construction of the fire-rated walls, Mr. Hodgin testified that the photograph taken in 2009, long after Marick had completed its work on Phase 1 and after the units had all been sold, showed that the corrections had in fact not been made. These facts support the conclusion that Marick failed to correct a significant life safety problem in at least one unit and suggests that it may not have done so in other units.

In sum, there was abundant evidence at trial that Marick undertook to do substantial work to complete units and also repair units in Phase I, and the evidence was equally compelling that Marick's efforts failed. Thus, this case is easily distinguished from *Roundtree*, which is simply not applicable to the facts here. The trial court properly submitted the warranty of service claim to the jury and failure to do so would have been reversible error.

b. The evidence at trial was sufficient to support the jury's finding that Marick proximately caused the HOA's damages.

Marick next argues that its work in Phase I caused at most $250,000 in damages and therefore th trial court should have granted its directed verdict motion. "Proximate cause does not mean the sole cause; the defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury." *Juaire v. United States*, No. 4:09-CV-709-TLW, 2012 WL 527598, at *11 (D.S.C. Feb. 16, 2012) *(citing Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997). A determination of proximate cause is a question of fact for the jury. Here, the jury determined Marick proximately caused the Plaintiff's damages.

Marick's argument is based upon testimony from the HOA's estimator, who was discussing repair costs, not allocating responsibility for those costs. First, the reference is an oversimplification of the testimony of both the estimator and the expert. As the facts noted by the Court of Appeals and those noted immediately above make clear, evidence of Marick's work included its work in completing Phase I of the Project, which was not complete and left vacant. It also included evidence of work Marick should have corrected and did not and evidence of damage caused by improperly performed repairs. As noted previously, the work described in the building permits Marick requested and received ranged from punch work in some units to work from the "foundation up" in at least one unit. (R. pp. 2738 – 2759 (App. pp. 2872 – 2893).) The value of the work to be performed pursuant to the permits, as Marick estimated, was more than $1.4 Million. (R. pp. 2738-2759 (App. pp. 2872 – 2893)). Whether the work would have required the same fix in 2005 or not, Marick failed to perform all work that was required work and negligently performed the work it did perform. There is evidence that Marick's negligence combined with that of Bostic to result in a single harm to the HOA, and therefore both Marick and Bostic were both liable for the damage. That is the law in South Carolina and that is what was communicated to the jury through the jury charges.

A reduction based on an allocation of fault is the purpose of S.C. Code Ann. §15-38-15 and as noted above, was utilized here to mitigate Marick's exposure in negligence and warranty, at Marick's request. The statute's very purpose is to prevent a defendant who may have a small percentage of responsibility for the overall damages from being held jointly and severally liable for the entire claim.

III. Marick and Thoennes are both liable for the HOA's damages.

Marick and Thoennes argue that the Court of Appeals erred in its assessment of Marick's liability for breach of fiduciary duty. The arguments are unsupported; the Respondents-Petitioners simply seek clarification. However, the Court of Appeals decision is fully supported by the facts of the case, as noted in their opinion, and is further supported below.

IV. The Court of Appeals properly affirmed the trial court's finding on amalgamation.

Marick and Thoennes argue against a finding of amalgamation and disagree with the findings of both the trial court and the Court of Appeals. Their arguments should be rejected for several reasons. First, at the trial court level and in the Court of Appeals, they failed to argue the "single business enterprise" concept or the law that supports it. Second, evidence supports a finding of amalgamation or single business enterprise. Finally, Marick challenges certain findings that do not require a finding of amalgamation.

Marick and Thoennes failed to argue the "single business enterprise" concept or the law that supports it and instead argued that individuals and companies cannot be amalgamated based on the argument and that there was no evidence that Marick, IMK and the other members and entities shared office space and phone numbers. While the sharing of offices and phone numbers was a factor considered by Judge Newman in *Magnolia North*, it is not a hard and fast requirement for amalgamation. Instead, in this matter the trial court and the Court of Appeals properly focused on

the fact that the conduct of IMK, Marick, the other entities, Thoennes and Cox when conducting business at Stoneledge, resulted in a blurring of the distinction between those entities and individuals.

The trial court concluded that the evidence supported a finding that IMK, Marick and the individual defendants were amalgamated. The testimony at trial was compelling regarding the blurred distinctions between those companies and the people who acted on their behalf. Thoennes's testimony was that, as the principal and license holder for Marick, which was a member of IMK (that is what the "M" in IMK stands for), and a member of the HOA Board of Directors for three years, he wore multiple hats at all times (developer, seller, board member and contractor). He was joined on the HOA Board by Bill Cox, a member of IK which was also a member of IMK (hence the "I" and "K" in the company initials). Both were on the board by virtue of IMK's right to control the Board until it decided to cede control to the owners. (Neither Marick nor IK had any legal right to control the Board.). The evidence also included testimony from homeowners who testified that they did not know what, if any, distinctions existed between IMK, Marick, IK, Thoennes or Cox. This evidence satisfies the requirements for amalgamation enunciated in *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 344 S.E.2d 869 (1986).

The Court of Appeals conducted its own review of the evidence and concluded that amalgamation was proper, applying the factors recently enunciated in *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 817 S.E.2d 273 (1028). In *Pertuis*, this Court reviewed a number of amalgamation cases and from them adopted the requirements for amalgamation. None of those referenced cases were ever cited by Marick in this case at any point. In *Pertuis*, this Court also recognized a specific requirement that must be met before an amalgamation (or single business enterprise) finding is warranted: there must be evidence of "bad faith, abuse, fraud, wrongdoing, or

injustice resulting from the blurring of the entities' legal distinctions." *Id.* at 280-81. Injustice in this context is a reference to the type of conduct the "corporate structure should not shield – fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like." *Id.* Marick also never argued or contended that evidence of "bad faith, abuse, fraud, wrongdoing, or injustice" was required for amalgamation, thus waiving the right to assert a failure of proof based on that now. *Id.*

Marick's argument should also be dismissed because, as the Court of Appeals held, the *Pertuis* factors were satisfied. The jury found that IMK, Thoennes, and Cox breached their fiduciary obligations to the HOA. The blurring of the multiple roles of the entities and individuals alone establishes unfair dealing, injustice and wrongdoing since they are inherently in conflict. For example, as contractor Marick should want to make all repairs necessary while as developer, it wants to keep costs down and profits up. A board member, who, as a fiduciary, must put the interests of the members of the HOA ahead of his own other interests, has an irreconcilable conflict when he knows of problems requiring correction but also stands to profit from the sale of the distressed units. While it would clearly be in the best interests of the owners to have the developer and the contractor correct all repairs, when the developer controls the board there is no disinterested person to assert those interests.

As Marick pointed out in its Brief in the Court of Appeals, after two weeks of trial, the trial judge found that IMK, Marick, Thoennes, Cox and Lollis engaged in "self-dealing." The structure of this Project, and the conflicts of Thoennes, Cox, IMK and Marick led to the problems at Stoneledge, which were passed on to the HOA. It would be manifestly unfair to allow those people and entities to now claim the protection of corporate structure when they casually disregarded it during the completion and sell-out of this Project to the public and after they controlled the Board for three

critical years despite clear conflicts of interest.

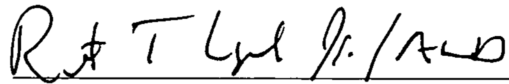
Finally, Marick argues that the theory of amalgamation cannot be applied to individuals and corporate entities, but offers no authority for that position or even any reason why that should be the law. The argument, advanced by Marick, is also backwards. It is individuals who are protected by corporate structure, not corporations. In this case, as noted by the Court of Appeals, Lollis was the only individual found liable for corporate actions by virtue of amalgamation, even though there was no evidence of any tortious conduct on his part. Lollis is not a party to this appeal.

Here, Marick argues that it should not be liable for the actions of Thoennes, its principal and license holder who personally sat on the Stoneledge HOA Board in furtherance of the business interests of IMK. Corporate entities can *only* be liable because of the actions of their employees and members, since they cannot undertake any action on their own. The Court of Appeals correctly held that Marick is liable for the actions of Thoennes and no amalgamation theory was required for that holding. While under appropriate facts Thoennes might try to insulate himself from personal liability for the corporate actions of Marick, that is not in issue here.

CONCLUSION

For the reasons set forth above, Petitioners-Respondents respectfully request that this Court affirm the trial court and the Court of Appeals on the issues raised by Respondents-Petitioners.

Respectfully submitted,



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October 25, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
OCT 28 2019
S.C. 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; 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 Enterprize 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.

Appellate Case No. 2019-000038

PROOF OF SERVICE

I certify that I have served the Respondents' Brief on behalf of Petitioners-Respondents on counsel for the Respondents-Petitioners by depositing a copy in the

United States Mail, First Class postage prepaid, this 25th day of October 2019, addressed to the following:

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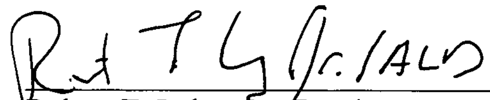

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