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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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Appellate Case No. 2019-000041
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, 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*.

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# REPLY BRIEF OF RESPONDENT-PETITIONER

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II. The Court of Appeals improperly affirmed the trial court's denial of Respondent-Petitioner's ("Bostic") motion for directed verdict as to the statute of limitations.

## REPLY COUNTERARGUMENTS[1]

Petitioner-Respondent ("Stoneledge") is asking this Court to review issues the Court of Appeals correctly held were errors of law and necessitated reversal or constituted the jury's findings of fact supported by the evidence, which must remain undisturbed. Stoneledge's arguments asking this Court to reinstate the verdict and application of the setoff as ruled by the trial judge are unavailing. The trial court's determination of the setoff was an error of law which was addressed and properly disposed of by the Court of Appeals in Stoneledge at Lake Keowee Owners' Association, Inc., et al. v. Bostic Brothers Construction, Inc., et al., 425 S.C. 276, 301-03, 821 S.E.2d 509, 522-23 (Ct. App. 2018).[2]

## I. THE COURT OF APPEALS CORRECTLY HELD THE $1 MILLION AWARD AGAINST MR. THOENNES FOR BREACH OF FIDUCIARY DUTY WAS NOT SUBJECT TO A SETOFF FROM PRIOR-SETTLED TORTFEASORS

The Court of Appeals correctly held the $1 Million award against Mr. Thoennes for breach of fiduciary duty does not benefit from a setoff from prior-settled tortfeasors. None of the board members settled prior to trial, therefore the Court of Appeals correctly concluded "none of the settlement proceeds should be set off against Thoennes' liability for breach of fiduciary duty because none of the settlement proceeds would have included any amount for damages resulting from a breach of fiduciary duty." Stoneledge, 425 S.C. 303, 821 S.E.2d 523.

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[1] For brevity, Bostic incorporates by reference its Statement of the Case and Statement of Facts detailed in its Brief filed September 19, 2019 and its Response Brief filed October 9, 2019 as if set forth fully herein verbatim.

[2] See Section F, entitled "Setoff", Stoneledge, 425 S.C. at 301-03, 821 S.E.2d at 522-23.

### A. The Court of Appeals Correctly Rectified an Error of Law Because The Breach of Fiduciary Duty Claim Is Not Subject To Setoff As It Is Excepted From The South Carolina Contribution Among Tortfeasors Act

Stoneledge contends that because the damage or injury – cost of repair – was the same as to each cause of action, i.e., the injury the Plaintiff suffered as to each defendant was all the same, then the entire award should have been subject to the $2.85 Million[3] setoff. On the contrary, the claim here involves a cause of action for breach of fiduciary duty which is expressly excepted from the South Carolina Contribution Among Tortfeasors Act ("SCCATA"). Counsel for Bostic argued at trial that the breach of fiduciary duty claim was excepted from the SCCATA and thus there needed to be three separate damages for each cause of action on the verdict form. (R. p. 1897 lines 4-24.)

As set forth in Bostic's initial brief filed September 19, 2019, South Carolina Code Chapter 38, SCCATA, expressly excludes application of setoff to a claim of breach of fiduciary duty. See S.C. Code Ann. § 15-38-20(G). This Court has established that "the legislature intends to accomplish something by its choice of words, and would not do a futile thing." Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) (emphasis added and citation omitted). Accordingly, in interpreting a statute, "the Court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless." Florence Cnty. Democratic Party v. Florence Cnty. Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (emphasis added) (citing Hinton v. S.C. Dep't of Probation, Parole and Pardon Servs., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004)).[4]

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[3] This figure is an approximation.

[4] Under South Carolina law, "[i]f a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation." Lester v. S.C. Workers' Comp. Comm'n, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (S.C. 1999) (citing Miller v. Doe, 312 S.C. 444, 441 S.E.2d 319 (S.C. 1994)).

Stoneledge, however, argues that "a non-settling defendant's right to a setoff does not arise solely from S.C. Code Section 15-38-50" and cites Riley v. Ford Motor Co. for the proposition that "The right to setoff has existed at common law in South Carolina for over 100 Years." 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015) (citations omitted). In 1988 the equitable principles of a setoff were codified as part of SCCATA, S.C. Code Ann § 15-38-50. This Court in Riley held "Despite a defendant's entitlement to setoff, whether at common law or under section 15–38–50, any 'reduction in the judgment must be from a settlement for the same cause of action.'" Riley, 414 S.C. at 196, 777 S.E.2d at 830 (citing Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998) (citing Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986) (refusing to apply settlement for pain and suffering cause of action to judgment in wrongful death action)). "Thus, where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset." Riley, 414 S.C. at 196, 777 S.E.2d at 830.

Even considering equitable principles in Riley, the Court of Appeals correctly held the breach fiduciary claim is not subject to a setoff. The Court of Appeals noted that no board members contributed to the settlement. No settling parties allocated settlement funds to breach of fiduciary duty or received a release for breach of fiduciary duty, and therefore the breach of fiduciary duty claim was not subject to a setoff from the settling tortfeasors. Moreover, by its clear and unambiguous language, SCCATA expressly excepts breach of fiduciary duty, and the Court of Appeals correctly overruled the trial court's application of setoff to the $1 Million award for breach of fiduciary duty under SCCATA.

### B. The Court of Appeals Did Not Provide a Holding as to Judgment Against Bostic

Despite Stoneledge's assertion that the Court of Appeals did provide a holding as to judgment against Bostic, the Court of Appeals' holding in Opinion No. 5601 ("Stoneledge II") "reverse[s] the trial court's setoff order and remand[s] for entry of judgment consistent with our decision in Stoneledge I." Yet, Stoneledge I only addresses entry of judgment as to Marick and Thoennes, and is silent as to the judgment to be entered against Bostic. Therefore, Bostic requests this Court to clarify the precise figures the Court of Appeals remands to the Circuit Court for entry of judgment against Bostic, respectfully, consistent with the figures provided herein.

The Court of Appeals erred in applying the setoff of $2,855,911.77 to the entire $4 million judgment. Bostic respectfully requests this Court reverse the application by the Court of Appeals of the setoff to the breach of implied warranty claims and respectfully requests this Court to apply the setoff as follows: setoff of $2,855,911.77 to the judgment of $3 million entered as to the negligence claims against Bostic and Marick, reducing the total judgment as to the negligence claims to $144,088.23. Bostic further respectfully requests this Court remand to enter judgment in accordance with Apportionment Form (R. p. 36), which apportions 60% to Bostic and 40% to Marick on the negligence claim, and 30% to Bostic and 70% to Marick on the breach of implied warranty claim as follows:

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

The Court of Appeals erred in its math when it applied the setoff to the implied warranty and negligence claims of $4 million and Bostic respectfully requests this Court reverse the Court of Appeals and remand to the lower court in this respect. In the alternative, Bostic argues the Court of Appeals erred in its application of setoff to the breach of warranty claims as well.[5]

## II. THE COURT OF APPEALS IMPROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF BOSTIC'S MOTION FOR DIRECTED VERDICT AS TO THE STATUTE OF LIMITATIONS

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

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

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

The applicable statute of limitations for causes of action sounding in negligence and breach of implied warranties after 1988 is three years. S.C. Code Ann. § 15-3-530 (Supp. 1997). "A cause of action accrues under South Carolina law the moment the defendant breaches a duty

[5] This issue was discussed in Bostic's Initial Brief filed September 19, 2019.

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

"A party has constructive notice if the party knows of 'facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right . . . has been invaded or that some claim against another party might exist.'" Id. (quoting Graniteville Co. v. IH Servs., Inc., 316 S.C. 146, 148, 447 S.E.2d 226, 228 (Ct. App. 1994). The Court of Appeals further held that the "[f]ailure of the injured party to comprehend the full extent of damages . . . is immaterial." Barr, 330 S.C. at 645, 500 S.E.2d at 160 (citations omitted). As numerous citations to the record indicate in Bostic's initial brief filed on September 19, 2019, there is only one reasonable inference to draw from the evidence – that the homeowners originally discovered defects as early as 2003 and the HOA was on notice as early as 2005 that some claim against Bostic might exist.

As provided in Barr, knowing the extent of the damage is immaterial. Id. Stoneledge argues in its response to Bostic's brief that the problems addressed prior to 2009 were addressed to the owner's satisfaction based upon what they knew at the time and these problems could not have placed the owners on notice of defects. However, Stoneledge's counterargument fits

squarely with Bostic's argument set forth in its initial brief, that the facts undoubtedly show the HOA was on notice, and as provided in Barr, there is no need to know the full extent of the damage. Moreover, the fact that a subsequent contractor's intervention was necessary to facilitate repairs in the first place demonstrates initial discovery of defects so as to commence the running of the statute of limitations.

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

Stoneledge's argument that Thoennes' knowledge was not imputed upon the HOA is disingenuous. It is a convenient but unconvincing argument that certain individuals had knowledge but never the HOA. Thoennes *was* the HOA, as he was on the board. Moreover, the jury ratified his responsibility by returning a verdict against him for breach of fiduciary duty. Just because Thoennes had numerous roles at Stoneledge did not somehow negate his knowledge as a board member.

### C. The Court of Appeals did not Reach the Argument Against Equitable Tolling

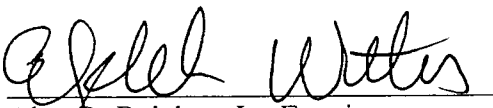
Although the Court of Appeals never reached the arguments as to equitable tolling, Bostic continues to rely on its argument that the statute of limitations should not be equitably tolled as set forth in its brief filed September 19, 2019. Stoneledge argues that the homeowners were at a disadvantage while IMK controlled the HOA. However, Stoneledge fails to acknowledge the crux of the issue that nothing prevented the HOA from bringing a suit against *Bostic* as early as 2005 when the HOA undertook to repair *Bostic's* work. The board members owed a fiduciary duty to the homeowners. It would be unjust to toll the statute of limitations as to Bostic, when Bostic had nothing to do with the control of the HOA at that time.

## CONCLUSION

Bostic respectfully requests this Honorable Court reverse the Court of Appeals' affirmation of the Circuit Court's denial of directed verdict based upon statute of limitations. Bostic respectfully requests this Honorable Court reverse the decision of the Court of Appeals and apply the setoff as to the negligence claims only, or in the alternative reverse the Court of Appeals' miscalculation of the setoff resulting in a $1,000,00.00 computation error and enter judgment as to Bostic consistent with the figures provided in Bostic's Briefs.

Bostic also respectfully requests this Court affirm the Court of Appeals' reversal of an error of law, in its holding the that trial court improperly invaded the province of the jury by amending the jury's verdict to find each cause of action independently supported a $5 million verdict; and affirm the Court of Appeals' holding the $1 million breach of fiduciary duty award adjudged against Mr. Thoennes is not subject to a setoff from prior-settled tortfeasors.

Respectfully submitted,



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Dated: This 28th day of October 2019

THE STATE OF SOUTH CAROLINA
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Defendants,

Of Which Bostic Brothers Construction, Inc., is the *Respondent-Petitioner*.

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**PROOF OF SERVICE**

I certify that I have served the Reply Brief of Respondent-Petitioner by way of U.S. Mail, stamped First Class delivery, on October 28, 2019, addressed to Stoneledge's attorneys of record, addressed as follows:

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