THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

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

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,

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REPLY BRIEF OF RESPONDENTS-PETITIONERS

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STATEMENT OF THE CASE

Respondents-Petitioners ask this Court to reverse the Court of Appeals final decision based upon errors of law and facts in the record made by the trial court. This brief is filed as a reply to Petitioners-Respondents' Brief.

This appeal arises out of a multi-unit residential construction trial. The Plaintiffs filed this case in individual and representative capacities, as well as through a Property Owners Association, alleging construction defects at a townhome project in Oconee County known as Stoneledge (hereinafter "Stoneledge" or "Project"). Plaintiffs made claims against two general contractors affiliated with the Project, Marick, and its affiliated member Rick Thoennes, and Bostic Construction (hereinafter "Bostic"). Plaintiffs also sued Bostic as the developer of Phase I and IMK as the developer of Phase II. Plaintiffs alleged that the exterior roofing, stonework, cedar siding, decks, windows, doors, and foundations were defectively constructed or installed. Stoneledge consists of 80 townhomes developed during two phases of construction. Only Phase I of construction is at issue in this Appeal. Bostic constructed all of the exteriors of the Phase I units alleged to be defective.

In the fall of 2013 the case was tried to verdict. On November 7, 2013, the jury returned a verdict against Marick and Thoennes for negligence, breach of warranty of workmanlike service and breach of fiduciary duty. Only one set of damages, a repair scope and estimate, was submitted by Plaintiffs against all parties on all causes of action. The jury returned a verdict for the Plaintiffs for actual damages of $3,000,000.00 for negligence in construction, $1,000,000.00 for breach of implied warranty of workmanlike service, and $1,000,000.00 for breach of fiduciary duty. The jury apportioned the damages amongst the parties as following:

Negligence

IMK Development Co., LLC/Marick Home Builders, LLC	40%
Bostic Brothers Construction, Inc.	60%
Implied Warranty of Workmanlike Service	**($1,000,000.00)**
IMK Development Co., LLC/Marick Home Builders, LLC	70%
Bostic Brothers Construction, Inc.	30%
Breach of Fiduciary duty	**($1,000,000.00)**
IMK Development Co., LLC	
Integrys Keowee Development, LLC	
William C. Cox	
Larry D. Lollis	
Rick Thoennes	

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

STATEMENT OF FACTS

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

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

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

ARGUMENTS

I. THE COURT OF APPEALS SHOULD HAVE REVERSED THE TRIAL COURT FOR NOT CHARGING THE CORRECT LAW

A. Liability Charge

Although Marick and the SOA disagree whether the trial court should have charged the law of Roundtree Villas, Marick and the SOA agree on the applicable law. As stated in the SOA's brief, "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." (Respondents' Brief on Behalf of Petitioners–Respondents, Pg. 9.) Marick agrees that it cannot be responsible under a breach of warranty of workmanlike service for work it did not perform. The breach of the warranty of workmanlike service literally arises out of performing the defective construction work. See Smith v. Breedlove, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008).[1] If Bostic built the exteriors of these units, as all of the evidence shows (apart from the permits pulled) it could not have been liable under a breach of the warranty of workmanlike service.

No evidence was submitted at trial that Marick constructed the roofs, exterior cladding, decks or window installation other than pulling permits. In fact, the vast majority of evidence at trial was that all of the defective exteriors of these buildings were already completed when Marick arrived. (R.p. 1473, lines 11-18; R.p. 1475, lines 13-20; R.p. 1498, line 17; R.p. 1499, line 74; R.p. 586, lines 18-25; R.p. 616, lines 5-14; R.p. 640, lines 1-24; R.p. 785, lines 12-25; R.p. 786, lines 1-15; R.p. 822, lines 1-16; R.p. 829, lines 1-5).

[1] A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner. Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989). This is distinct from an implied warranty of habitability, which arises solely out of the sale of the home.

Marick does not argue that it should be treated as a lender; instead it argues that it cannot be liable under a theory of breach of the warranty of workmanlike service for work that it did not construct. It admits that it can be liable for negligent investigation or repair, if proven, but the damages proximately resulting from that negligent investigation was $250,000.00 according to the SOA's own experts. (R.p. 1317, lines 14-21; R.p. 1227, line 21; R.p. 1249, line 21). Instead, coupled with the lack of a jury charge on this complicated and difficult issue culminating after two weeks, co-counsel argued that IMK/Marick sold 70% of the units and the jury returned a verdict that Marick was liable under a breach of the warranty of workmanlike service equal to 70%. This does not fit the evidence in the case and the jury was not informed that the original builder of the defective condition could be liable under a theory of breach of the warranty of workmanlike service, but a subsequent purchaser could only be liable for work that it performed under a breach of the warranty of workmanlike service or under a theory of negligent inspection or repair. The evidence only showed $250,000.00 proximately caused by that failure but that amount was not accurately reflected in the jury's judgment.

Therefore, in this case, because of the two different categories of builders – the original builder who built all of the exteriors of these buildings, and a subsequent purchaser who completed the interiors and did repairs on the original construction the jury should have been informed about the distinction between the two entities and the law applicable to each. This is clear error.

B. Breach of Implied Warranty of Habitability Charge

As stated above, in light of the trial court's failure to instruct the jury regarding the options for assessing liability against two different builders, the trial court also instructed the jury two times on the elements of the breach of the warranty of habitability. Marick disagrees with

both the SOA and Appellate Court's arguments that the warranty of habitability charge was isolated, buried, and harmless.

The jury was not charged regarding the different avenues of liability for two different builders in two different roles. The jury was also not informed and educated how they could make a distinction between the original builder and its alleged deficient construction and a subsequent purchaser and its alleged deficient construction and alleged negligent inspection. Because of this failure to educate the jury, the jury was clearly confused about the warranty cause of action and not only heard the wrong elements of the warranty cause of action in the initial jury charge, but specifically asked for a second reading of the warranty charge which was again misread. This error coupled with Co-Defendant's argument that IMK/Marick sold 70% of the units and therefore should be responsible for 70% of them clearly caused confusion in the jury. Liability for the sale of a residential unit arises out of the breach of the warranty of habitability which is the jury charge the trial court read to the jury two different times. Therefore, the trial court read a jury charge which instructed the jury to find liability arising out of the sale of the homes, Co-Defendant argued that the jury should find liability based upon the sale of the homes, the jury asked for that charge to be read again and the trial court read that liability could rise out of the sale of the home, and the jury awarded a verdict under the breach of warranty of workmanlike service for 70% of the homes sold by Marick. This was not a coincidence. The jury was clearly uninformed about the path to liability for Marick and relied upon the judge's erroneous charges and defense counsel's erroneous request to the jury based upon the sale the homes.[2] Therefore, the charge was not only wrong in its application, but its existence in the jury

[2] It should be noted that there was no warranty of habitability in the case as it had been dismissed in the summary judgment phase.

charges at all. It also clearly had an effect on the jury and they asked for a rereading of that charge while deliberating.

II. THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S DENIAL OF DIRECTED VERDICT

A. Breach of Implied Warranty of Workmanlike Service

Marick's argument, contrary to the SOA's brief, is that the trial court erred in not granting directed verdict on the implied warranty of workmanlike service for construction defects it did not construct. The implied breach of the warranty of workmanlike service arises out of the construction of building components. See Smith v. Breedlove, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008). It does not arise out of negligent inspection, and/or failure to perform work. The implied warranty of workmanlike service must arise out of actual construction work. Despite the SOA's argument that there is clear and overwhelming evidence that Marick actually performed extensive work in Phase I, the record does not support this argument. Instead, Plaintiffs themselves, the homeowners, and Plaintiff's experts all testified that the exterior of the units were complete when Bostic left the project in 2004. (See above.) While it may have been in disrepair and vacant for some period of time and thus required an inspection leading to a cause of action for negligent inspection, Marick could not be liable for existing construction defects in the construction of the roof, window installation, stone cladding installation, waterproofing, fire walls, deck construction or Hardie board exterior installation that predated Marick's arrival on the project and which was not installed by Marick.

Plaintiff submitted evidence at the trial that Marick pulled permits and attempted repairs to the decks, but this again does not rise to the level of showing that Marick performed construction work on the roof and there is no evidence of that. In fact, Plaintiff's own expert

testified the deck repair would remain the same after Bostic left. There was also no evidence presented that Marick installed any of the below grade waterproofing at the units or that Marick installed any of the windows in Phase I. Further, there was no evidence that Marick installed any of the Hardie board or stone exterior cladding. The only evidence submitted to the jury was the permits which do not, in and of themselves, equate to Marick actually performing construction work which could lead to a cause of action for breach of the implied warranty of workmanlike service.

The SOA confuses the implied warranty of workmanlike service with undertaking to make repairs in Phase I. Marick admits that there is a cause of action for negligent inspection and further a cause of action for breach of the implied warranty of workmanlike service for the work that it performed. For instance, Marick admitted that it knew some of the decks were leaking and tried to seal them with a coating. If this work was defective it would lead to a cause of action for breach of the implied warranty of workmanlike service; however, attempting to fix pre-existing construction defects does not give rise to breach of the implied warranty of workmanlike service for all of the existing decking, framing and waterproofing that was installed by Bostic. Therefore, the Court of Appeals should have directed a verdict on the roof, below grade waterproofing, decks, stonework, and window installation for which there was no proof that Marick performed the original defective construction.

As the SOA admits in its brief, Marick's superintendent may have been aware of construction deficiencies at the time it assumed responsibility for the project – which supports Marick's argument that the construction deficiencies predated its involvement in the project and therefore could not give rise to breach of implied warranty of workmanlike service for those pre-existing construction defects. Further, the SOA cites to Hodgins' observation of two units that

were incomplete when he performed his investigation in 2009. Photos of those units were presented to the superintendent for Marick. What the SOA does not share in that argument is that those units were never worked on by Marick or sold by IMK. (R.p. 1498, line 17; R.p. 1499, line 24). That damage was solely the result of Bostic's work and was never worked on by Marick. Thus, the damage cited by the SOA in its argument is proof that the trial court should have granted directed verdict specifically on that work as Marick did not work on it and thus cannot be liable for it under a theory of breach of implied warranty of workmanlike service.

The same is true of the interior fire rated walls which were not properly constructed. The SOA may have an argument that those fire rated walls should have been repaired by Marick and/or gives rise to a negligence or negligent inspection cause of action, but no proof was submitted that Marick did work on those fire rated walls and therefore it cannot be liable for breach of the implied warranty of workmanlike service. Therefore, the facts the SOA cites actually support Marick's argument that directed verdict should have been granted on all of the construction deficiencies constructed by Bostic and not constructed by Marick.

B. Proximate Cause

The evidence at trial was not sufficient to support the jury's finding that Marick proximately caused the SOA damages and the SOA does not cite anywhere in the record which supports their "facts" in their arguments. Again, the SOA relies solely upon the permits which have little to do with the work Marick actually performed. Further, the testimony did not come from a Marick or defense expert but came from the SOA's own experts that Marick's negligent repair and/or negligent inspection only caused approximately $250,000.00 in damages in addition to the necessity of repairing the construction defects left by Bostic.

Again, the SOA confuses the issue and attempts to argue a combined negligent repair/breach of the warranty of workmanlike service cause of action. As stated above, the two causes of action have different elements and the breach of the implied warranty of workmanlike services arises out of performing the construction work. Here, Plaintiff's own experts testified that Bostic performed the deficient construction work and Marick's failure to repair it in a timely manner only caused $250,000.00 in additional damages. Therefore, again in combination with the error to charge the entire and correct law to the jury, the jury was allowed to award damages over $250,000.00 under a breach of implied warranty of workmanlike service cause of action despite the lack of evidence to support that verdict.

The SOA argues that Marick's negligence should be combined with Bostic to result in a single harm and therefore throws out the distinction between negligent repair, negligent inspection, and breach of the implied warranty of workmanlike service. There is no case law and no support that two separate causes of action, by two separate parties, who conducted different functions, at separate times, with clearly delineated damages based on the elements for each need to be combined to obliviate the elements of each causes of action. This argument simply ignores the law and would remove any need to plead and prove separate cause of action. In this case, it could have been very simple for the jury to award damages for breach of the implied warranty of workmanlike services against Bostic and award damages for negligent repair or negligent inspection against Marick based upon the Plaintiff's own experts' testimony. Here, because of the combination of the lack of the trial court charging the entire and correct law, failing to correct an erroneous jury charge, and failing to direct a verdict on the cause of action for breach of the implied warranty of workmanlike service, the jury simply grouped together all of the damages which is not supported by the evidence at trial as proximately causing all of those damages.

III. THE COURT OF APPEALS ERRED BY NOT CLARIFYING ITS OPINION OF THE BREACH OF FIDUCIARY DUTY

The SOA does not make an argument in regard to request for clarification on which Defendant or Defendants are liable for breach of fiduciary duty. Therefore, it is clear that the Appellate Court erred by finding Marick responsible for breach of fiduciary duty as Marick did not appear on the jury verdict form as potentially liable for that breach. Therefore, the Supreme Court should remedy that error by finding that only Rick Thoennes is liable for breach of fiduciary duty as he was the individual on the board and on the jury verdict form.

IV. THE COURT OF APPEALS ERRED BY UPHOLDING THE TRIAL COURT'S FINDING OF AMALGAMATION

The Appellate Court was correct that the trial court did not do an appropriate evaluation of the amalgamation theory. The Appellate Court was correct when it stated the trial court, "Failed to conduct a meaningful analysis supporting amalgamation of interest." The SOA argues that the single business enterprise law was not argued at trial or the Appellate Court and therefore should be abandoned. However, the joint business enterprise theory was not pled by Plaintiffs, was not charged to the jury, and was not decided, as stated by the Appellate Court, until after the trial. Further, the SOA simply states, "Evidence supports a finding of amalgamation or single business enterprise" and provides no citation or evidence which would support this argument. Clearly, there was no evidence submitted sufficient to support an amalgamation or single business enterprise decision to the trial court and the SOA cannot cite anywhere in the record in its brief to support that argument. Further, the SOA argues that the "Testimony at trial was compelling regarding the blurred distinctions between those companies and the people who acted on their behalf" yet cites nowhere to the record where this compelling testimony at trial occurred. The Appellate Court was absolutely correct in finding that there was

no meaningful analysis done of amalgamation and it did no meaningful analysis of amalgamation or the joint enterprise theory in finding that the trial court was correct despite its lack of "any meaningful analysis." The SOA simply writes its own version of what occurred at the trial and cites to no place in the record supporting its conclusions, evidence, or testimony. Therefore, it appears the SOA has abandoned this issue and agrees that amalgamation and joint enterprise were not supported trial.

Further, the SOA is incorrect that findings of breached fiduciary obligations supports an argument that the elements of amalgamation or joint business enterprise were proven. Again, the SOA simply makes self-serving arguments without any citation to the record that the parties engaged in unfair dealing, injustice and wrongdoing. The SOA seems to abandon this argument as it makes self-serving statements about what the record contains but does not cite to it anywhere in this section.

CONCLUSION

For the foregoing reasons the Respondents-Petitioners respectfully request that this Court reverse the decision of the Appellate Court and order a new trial with the use of the correct law.

Respectfully submitted,

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November 7, 2019

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

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Respondents-Petitioners Marick Home Builders, LLC and Rick Thoennes by depositing a copy of it in the United States Mail, First Class postage prepaid, on November 7, 2019, addressed to Respondents' attorneys of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, P.O. Box 773, Charleston, SC 29401.

Stephanie S. Simpson
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November 7, 2019

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