



The Supreme Court of South Carolina

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January 04, 2022

The Honorable Melissa C. Burton
PO Box 678
Walhalla SC 29691-0678

REMITTITUR

Re: Stoneledge v. IMK Dev. (Marick/Thoennes)
Lower Court Case No. 2009CP3700652
Appellate Case No. 2019-000038

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CHIEF DEPUTY CLERK

cc: Jason Michael Imhoff, Esquire
Robert T. Lyles, Jr., Esquire

Lee Anne Walters, Esquire
Jenny Abbott Kitchings, Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

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

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 28071
Heard October 14, 2020 – Filed December 8, 2021

**AFFIRMED IN PART; REVERSED IN PART; AND
REMANDED**

Robert T. Lyles Jr. and Lee Anne Walters, both of Lyles & Associates, LLC, of Charleston, for Petitioners-Respondents.

Jason M. Imhoff, of Kenison Dudley & Crawford, LLC, of Greenville, for Respondents-Petitioners.

JUSTICE JAMES: This appeal stems from a construction defect lawsuit involving waterfront townhomes on Lake Keowee in Oconee County. After a two-week trial, Petitioners-Respondents Stoneledge at Lake Keowee Owners' Association, Inc. (the HOA) received plaintiff's verdicts against several defendants, including Respondents-Petitioners Marick Home Builders, LLC and Rick Thoennes. Marick Home Builders, Thoennes, and other defendants appealed, and in a pair of published opinions, the court of appeals affirmed in part and reversed in part. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 425 S.C. 276, 821 S.E.2d 509 (Ct. App. 2018) (hereinafter *Stoneledge I*); *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 425 S.C. 268, 821 S.E.2d 504 (Ct. App. 2018) (hereinafter *Stoneledge II*).

We granted several writs of certiorari to review the court of appeals' decisions. In this opinion, we review *Stoneledge I* and address the trial court's (1) jury charge, (2) denial of Marick's directed verdict motions, (3) finding of amalgamation, and (4) calculation of damages.¹ We affirm the court of appeals as to the jury charge and as to the trial court's denial of Marick's motions. We reverse the court of appeals as to amalgamation. We affirm in part and reverse in part the court of appeals as to the amount of the judgment in favor of the HOA and remand to the circuit court for final calculation and entry of judgment consistent with this opinion.

BACKGROUND

Immersion into the facts of this case and its knotty trial and appellate issues is not for the weary. In *Stoneledge I*, the court of appeals accurately summarized the pertinent facts and legal issues, but for easier reading, we will restate most of them. In 2002, Bostic Brothers Construction, Inc. (Bostic) began construction on a large luxury townhome project in Oconee County on Lake Keowee (Stoneledge). Construction of Stoneledge was divided into Phase I and Phase II. This litigation is limited to the thirty-seven units built during Phase I. Like other townhome communities, a homeowners' association would be responsible for maintaining the

¹ To ensure a complete discussion of the calculation of damages in this case, we have addressed issues raised by the HOA and Bostic Brothers Construction, Inc. in their related appeal. We have issued a separate opinion addressing the other issues raised in that appeal. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, Op. No. 28070 (S.C. Sup. Ct. filed December 8, 2021) (Howard Adv. Sh. No. 43 at 11).

common areas and the exterior of the buildings. The stone-clad, waterfront townhomes were marketed as "quality" construction and "maintenance free." A marketing brochure touted "pleasurable experiences all year long." Unfortunately for the homeowners, this turned out not to be the case.

Bostic was the original general contractor on the project and was a part-owner of the original development company, Keowee Townhouses, LLC. At the time, Bostic was a large construction company with several other projects throughout the Southeast. By late 2004, Bostic had problems finishing other jobs and ceased operations at Stoneledge; at that time, only a few Stoneledge units had been completed and sold. A homeowner compared Stoneledge to a "ghost town" and noted Bostic had completed the exteriors of the unsold units but had not finished the interiors before walking away. Stoneledge was on the brink of foreclosure.

In March 2005, Keowee Townhouses escaped foreclosure by selling the entire Stoneledge project, including the remaining twenty-five or so unfinished units in Phase I, to IMK Development Company, LLC. IMK is comprised of Integrys Keowee Development, LLC (IK) and Marick Home Builders, LLC (Marick). IK's members include William Cox and Larry Lollis. Marick's managing member and construction license holder is Rick Thoennes. IK provided the funding to complete construction, and Marick became the general contractor and completed Phase I.

Marick's site superintendent, Nathan Hornaday, testified he walked through the units shortly after IMK purchased the project to inspect for damage and to make a list of everything that needed to be fixed. He testified to the overall condition of the units and explained, "[M]ainly everything was finished except for, I think, two or three units. I'm not sure. And those units had all the exterior done. They didn't have sheetrock inside of them, but I believe -- I'm not sure, but I believe everything else was finished." Hornaday testified the exterior of the units, including the roofs, porches, decks, and siding, had been completed and that only two or three units needed doors installed. Hornaday testified Marick intended to fix all of the problems with the Phase I units.

Hornaday testified he pulled building permits needed to complete the unfinished units. The work description on a majority of the permits stated Marick was to "Complete Townhome from Rough-in Stage," but a few of the permits stated Marick was to "Complete Townhome from Foundation Stage." According

to the permits, Marick estimated that the cost to complete the remaining units totaled more than \$1.4 million. Marick worked to complete the unfinished units but also undertook repairs on some of the finished units. For example, Marick addressed a variety of issues raised by Steven Taylor and Robert White, who owned finished townhomes, and contracted with a waterproofing company to apply a waterproof coating to all of the Phase I decks and porches.

IMK created the HOA in 2005, and the HOA board was comprised of IMK representatives—including Cox, Lollis, and Thoennes. A homeowner testified HOA board business was regularly conducted, but he noted there was not a lot of interaction between the board and the homeowners. IMK remained in control of the HOA board until September 2008, when IMK turned control of the board over to the homeowners. IMK sold Stoneledge to a new developer, S.D.I./Ludwig Corporation, LLC.

In late 2008 or early 2009, the homeowner-controlled HOA began receiving numerous requests for repairs of damage caused by water intrusion, and it did not take long for the HOA to realize it could not afford the repairs. The HOA paid to fix what it deemed "emergencies" and hired an engineering company to look deeper into the problems. Destructive testing revealed substantial water damage throughout Phase I. In May 2009, the HOA filed this action against a myriad of defendants, including developers, general contractors, subcontractors, and other individuals. The HOA asserted several causes of action, including the ones pertinent to this appeal: negligence, breach of the implied warranty of workmanlike service, breach of the implied warranty of habitability, and breach of fiduciary duty. Extensive discovery ensued, but the case finally made it to trial.

During the two-week trial, the defendants did not dispute the HOA's claim of faulty construction. All parties agreed the HOA's actual damages claim was limited to the cost of repair. The main disputes centered upon the scope and cost of those repairs and which defendants were responsible.²

Derek Hodgin, the HOA's forensic engineer, testified he found damage at every place he made a test cut. He testified water intrusion had caused extensive damage to roofs, windows, balconies, and foundations. He also testified the

² Bostic asserted a statute of limitations defense. That defense was addressed by the court of appeals in *Stoneledge II* and is the subject of our companion opinion in this case.

firewalls separating the units had been improperly installed. Hodgkin testified the observations made by Marick when it took over the project triggered Marick's obligation as general contractor to perform a more thorough investigation to ascertain the source of the problems. Hodgkin testified to a broad, extensive scope of repair. Bostic's expert, Richard Moore, presented a narrower, more surgical scope of repair. Estimators testified it would cost \$6,309,197 to implement Hodgkin's scope of repair and slightly less than \$4,000,000 to implement Moore's scope of repair.

Many defendants settled before and during trial. When the jury began deliberations, the only remaining defendants were Bostic, Marick, IMK, IK, Thoennes, Cox, and Lollis. The jury returned verdicts for the HOA as follows:

- \$3,000,000 for negligence against Bostic and IMK/Marick;
- \$1,000,000 for breach of the implied warranty of workmanlike service against Bostic and Marick;
- \$1,000,000 for breach of fiduciary duty against IMK, IK, Thoennes, Lollis, and Cox.

After the jury verdicts were read, counsel for the HOA expressed confusion and asked the trial court if the verdicts were "cumulative," and the trial court replied that it thought they were. Counsel for the defendants did not comment on this exchange, and no one, including the trial court, explained their understanding of what "cumulative" meant. As we will explain, this confusion could have been completely avoided if just one party had requested the trial court to order the jury to reform its verdicts to reflect the same award of actual damages for each cause of action.

The trial then proceeded to the damages apportionment phase as to the negligence and breach of warranty verdicts. After hearing brief arguments from counsel on apportionment, the jury allocated 60% of the negligence verdict against Bostic and 40% against IMK/Marick. The jury allocated 70% of the breach of implied warranty verdict against IMK/Marick³ and 30% against Bostic.

³ The implied warranty verdict form lists Bostic and Marick as the potentially liable defendants; however, the subsequent apportionment form lists Bostic and "IMK/Marick" for the implied warranty award. The record does not reveal why

The trial court issued a Form 4 order entering judgment against Bostic and IMK/Marick in amounts reflecting the apportionments. The order also entered judgment against the five breach of fiduciary duty defendants in the amount of \$200,000 each (obviously a division of \$1,000,000 by five). Thereafter, counsel for the HOA appropriately notified the trial court that the HOA had previously received \$2,855,911.77 in settlements from other Phase I defendants.

The parties timely filed post-trial motions, and, upon motion of the HOA, the trial court amended the three verdicts to award \$5,000,000 to the HOA for each cause of action, subject to the apportionment percentages. The trial court then calculated the setoff of prior settlements paid by other Phase I defendants.

Marick, Thoennes, and Bostic appealed,⁴ and the court of appeals issued two published opinions: *Stoneledge I*, 425 S.C. 276, 821 S.E.2d 509 (Ct. App. 2018) and *Stoneledge II*, 425 S.C. 268, 821 S.E.2d 504 (Ct. App. 2018). In *Stoneledge I*, the court of appeals reversed the trial court's decision to raise the three verdicts to \$5,000,000 each, affirmed the trial court's denial of directed verdict motions, affirmed the trial court's "finding" of amalgamation, and adjusted the trial court's calculation of the final judgments. This Court granted cross-petitions for writs of certiorari arising from both *Stoneledge I* and *Stoneledge II*. This opinion is our review of *Stoneledge I*.

DISCUSSION

The parties argue the trial court erred in its: (1) jury charge, (2) denial of directed verdict motions, (3) finding of amalgamation, and (4) calculation of damages to be awarded on the three causes of action at issue.

A. Jury Charge

Marick argues the trial court erred by (1) not charging the jury that Marick could be held liable only for work it performed at Stoneledge and (2) charging the jury on breach of implied warranty of habitability. Marick contends the trial

IMK was included on the apportionment form. In any event, IMK was dismissed from the action while the case was pending before the court of appeals.

⁴ IMK, IK, Lollis, and Cox also appealed, but the HOA's actions against them were dismissed during briefing at the court of appeals. The record does not reflect whether these dismissals arose from settlement or some other event.

court's errors were prejudicial and require reversal. The court of appeals affirmed the trial court on those points and also rejected the HOA's preservation argument. *Stoneledge I*, 425 S.C. at 286-92, 821 S.E.2d at 514-17. We agree with the court of appeals' entire analysis and therefore affirm.

B. Directed Verdict

The court of appeals affirmed the trial court's denial of Marick's directed verdict motion as to the HOA's breach of implied warranty of workmanlike service claim and affirmed the trial court's denial of Marick's motion for a partial directed verdict on the negligence claim. *Id.* at 293-96, 821 S.E.2d at 518-20. Marick argues this was error. We agree with the court of appeals' analysis of these two issues and therefore affirm.

C. Amalgamation (Single Business Enterprise Theory)

Actions to pierce the corporate veil and to find a party responsible under the alter-ego theory lie in equity. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012). Likewise, an action to amalgamate parties lies in equity. *See Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 648, 817 S.E.2d 273, 277 (2018) (noting equitable principles govern the application of amalgamation). Therefore, our standard of review on this issue is de novo and allows us to find facts in accordance with our own view of the preponderance of the evidence. *Oskin*, 400 S.C. at 397, 735 S.E.2d at 463. Despite this broad standard of review, we are not required to disregard the trial court's findings of fact, and we are mindful the trial court sits in a better position to assess witness credibility. *Id.*

South Carolina first recognized the theory of amalgamation in *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986), in which the court of appeals held "an amalgamation of corporate interests, entities, and activities . . . blur[red] the legal distinction between [three related] corporations and their activities" Since then, this Court and the court of appeals have discussed the theory on several occasions. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 340-41, 384 S.E.2d 730, 734 (1989); *Mid-South Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 604-05, 649 S.E.2d 135, 144 (Ct. App. 2007); *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 417-20, 717 S.E.2d 765, 772-73 (Ct. App. 2011); *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc.*, 397 S.C. 348, 358-60; 725 S.E.2d 112, 117-18 (Ct. App. 2012). We recently formally recognized and refined this theory in *Pertuis*, where we referred

to the amalgamation theory as "the single business enterprise theory." 423 S.C. at 651, 817 S.E.2d at 278. We will use those terms interchangeably in this opinion.

The parties have not raised this point, but the only decision made by the trial court regarding amalgamation was to deny Marick and Thoennes's directed verdict motion on that issue. The trial court never made a final ruling on the merits of the amalgamation claim, which was an equitable claim to be decided by the trial court, not by the jury. Even if the claim was to be decided by the jury, there was no jury charge, closing argument, verdict form, or jury verdict on amalgamation. During the post-trial motion stage, Marick and Thoennes argued only that the trial court erred in denying their motion for a directed verdict. In any event, for the duration of this appeal, the parties have treated the trial court's denial of the directed verdict motion as a final finding by the trial court on the merits, and the court of appeals treated it as such. Because the affected parties have treated the amalgamation claim as having been ruled upon on the merits, we will address the claim on the merits.

The HOA originally sued IMK, IK, Marick, Cox, Lollis, and Thoennes under the theories of amalgamation, alter ego, and piercing the corporate veil. However, at trial, the HOA conceded the theories of piercing the corporate veil and alter ego were not applicable and advised the trial court it was pursuing the theory of amalgamation as to IMK, Marick, and Thoennes. The trial court denied Marick and Thoennes's motion for a directed verdict on amalgamation, finding there was sufficient evidence of "self-dealing" to send that issue to the jury.

The court of appeals correctly noted the trial court conducted no analysis regarding the amalgamation of IMK, Marick, and Thoennes. *Stoneledge I*, 425 S.C. at 298, 821 S.E.2d at 520. Perhaps that is so because the trial court considered the issue only at the directed verdict stage and never decided the claim on the merits. Marick argues the court of appeals erred in affirming the trial court's amalgamation of Marick with IMK. Thoennes argues the court of appeals erred in affirming the trial court's amalgamation of him with IMK. Thoennes also argues there is no authority for the proposition that he, as an individual, can be amalgamated with a business entity such as IMK.⁵ We agree with Marick and Thoennes.

⁵ Marick and Thoennes do not contest the trial court's amalgamation of their interests with one another.

In *Pertuis*, a restaurant manager was a minority shareholder in a corporation that owned the restaurant. 423 S.C. at 644, 817 S.E.2d at 275. The majority shareholders in this corporation owned shares in three other corporations. The restaurant manager claimed these three other corporations and the corporation that owned the restaurant were amalgamated into a single entity. The manager claimed this amalgamation entitled him to distributions from the three other corporations. We surveyed the law from several other jurisdictions and summarized the single business enterprise theory as follows:

[W]here multiple corporations have unified their business operations and resources to achieve a common business purpose and where adherence to the fiction of separate corporate identities would defeat justice, courts have refused to recognize the corporations' separateness, instead regarding them as a single enterprise-in-fact, to the extent the specific facts of a particular situation warrant.

Id. at 652-53, 817 S.E.2d at 279. We acknowledged "corporations are often formed for the purpose of shielding shareholders from individual liability[.]" and we noted "there is nothing remotely nefarious in doing that." *Id.* at 655, 817 S.E.2d at 280. Thus, we held the single business enterprise theory requires more than just a showing that the various entities' operations are intertwined. For a court to combine different corporate entities into a single business enterprise, there must also be a showing of "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* at 655, 817 S.E.2d at 281. We cautioned, "[a]s with other methods of piercing the corporate form that have previously been recognized in South Carolina, equitable principles govern the application of the single business enterprise remedy, and this doctrine 'is not to be applied without substantial reflection.'" *Id.* (quoting *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008)). We made clear the burden of proof lies with the person seeking to prove the existence of a single business enterprise. *Id.*

IMK, a limited liability company, was created to hold title to Stoneledge. IMK's members were IK and Marick, each holding a 50% interest in IMK. IK's members were Lollis (20%), Cox (40%), and Tim Roberson (40%). Marick's members were Thoennes (50%) and Thoennes's son (50%). The following trial

testimony provides greater insight into IMK's structure and how these entities and individuals conducted business.

Lollis testified he invested in Stoneledge at Roberson's behest. Lollis testified he was strictly an investor; he claimed he did not have any other involvement in IMK and was not familiar with IMK's day-to-day business. Lollis testified he did not know whether IK participated in the sale of Stoneledge units. Lollis acknowledged he received money from IMK's sale of units, and he testified he did not know whether there was any money left in IMK when IMK sold Stoneledge to S.D.I./Ludwig in 2008. Lollis testified he (1) did not know who was on the IMK HOA board, (2) did not attend any HOA board meetings, and (3) received copies of the meeting minutes in the mail. He testified he became aware of the construction defects only after the lawsuit was filed.

Cox, a managing member of IK, testified IK was formed to provide the investment capital needed to purchase and fund the Stoneledge project. Regarding the relationship between Marick and IK, he testified "Marick Home Builders was to provide the construction at their cost, and IK provided the investment. And [IK] did the books for IMK. And the agreement was we would split the profits [from the sale of the units]." Cox testified a couple of the salespeople for IMK were not employees of IK but were housed in IK's offices and used IK's email. Cox testified Marick was in charge of supervising these "contract salespeople."

Cox testified he negotiated IMK's sale of Stoneledge to S.D.I./Ludwig. He testified that sometime before the sale, he learned Marick owed money to S.D.I./Ludwig and that Marick pledged its profits from Stoneledge as collateral. Cox testified IK sold S.D.I./Ludwig its interest in IMK for cash, plus a percentage of the gross sales price for any remaining unsold units. Cox testified the funds IMK received from the sale were disbursed to IK's members. Cox testified that shortly after the sale, IMK turned the HOA board over to the homeowners. Cox testified IMK was insolvent and did not have any money to satisfy a possible judgment in favor of the HOA.

Thoennes testified he was the managing member and held the construction license for Marick. He testified his son, Rick Thoennes III, was also a member of Marick. Thoennes summarized the relationship between IK and Marick, stating "[IK] put in money; I put in hard labor." He testified that before IMK purchased the project, he inspected the units to make sure the project would be a good investment. Thoennes testified Marick charged IMK for Marick's construction

costs. He explained he would submit an invoice to IMK, IMK would write a check to Marick, and Marick would pay its suppliers, employees, and subcontractors. When asked whether Marick was responsible for the management of the Stoneledge sales team, Thoennes replied, "For the most part[.] IMK had some responsibility in that too. I mean, the sales was -- all had to be approved by IMK and what we were doing, and then sales materials and all of those things. So certainly IMK had some responsibility for the sales." Thoennes testified it was Marick's decision as to what work needed to be done on the Phase I units. Thoennes testified that when a unit owner had an issue, the owner would not go through a "formal process" by bringing the issue to the IMK-run HOA board but would bring it directly to him or Hornaday. Thoennes acknowledged he was an HOA board member. Thoennes testified about his many roles at Stoneledge:

It depends on which hat I had on on that particular day. I've been -- [counsel for the HOA] said I sold them. Somebody else said I built them, and somebody else said I'm a director on the board.

....

So I guess it depends on which hat I had. You know, on some days I would go out and jump somebody's car, so I guess I was a mechanic too. But I just -- you know, I didn't have the pleasure of being able to say, I'm a director now. At seven o'clock, I'm a contractor. At eight o'clock, I'm a marketing person. I didn't have that luxury. . . . It was very informal.

Thoennes testified Marick shut down its business shortly after the Stoneledge project failed.

Some of the homeowners were confused about the distinctions between and the roles these companies and individuals played. Homeowner Taylor testified he made no distinction between IMK and Marick. Further, Homeowner White testified, "IMK, to me, in terms of the faces of the folks that were part of IMK were Rick Thoennes and his son and Tim Roberson." White testified it was not until "later on" that he realized IMK was a combination of IK and Marick.

In their directed verdict motion on the amalgamation issue, Marick and Thoennes argued against the HOA's "piercing the corporate veil, amalgamation, alter ego, throw everything up against the wall, they're-all-together-and-everything-should-stick analysis." Marick and Thoennes presented a detailed argument to the trial court as to why the theories of piercing the veil, alter ego, and amalgamation should not be applied in this case. The HOA conceded that the theories of piercing the corporate veil and alter ego were inapplicable to Marick and Thoennes but argued amalgamation was a viable theory. The trial court denied Marick and Thoennes's motion for directed verdict on the amalgamation claim, stating there were factual issues for the jury to resolve.

In addressing the merits of the amalgamation claim, the court of appeals acknowledged this case was tried before our decision in *Pertuis* but found the trial court "failed to conduct any meaningful analysis supporting an amalgamation of interests." *Stoneledge I*, 425 S.C. at 298, 821 S.E.2d at 520. Nevertheless, the court of appeals affirmed the trial court in result, holding, "[O]ur review of the record reveals evidence of a unified operation between Marick and the amalgamated parties as well as evidence of self-dealing that resulted from a blending of their business enterprises." *Id.* The court of appeals found the "bad faith, abuse, fraud, wrongdoing, or injustice" requirement was met because Thoennes had "at least constructive knowledge of the pervasive construction defects . . . but was nevertheless directly involved in IMK and Marick's marketing and sale of the units." *Id.* at 299-300, 821 S.E.2d at 521. The court of appeals concluded, "Given that Marick's and IMK's profits were entirely dependent on IMK's ability to sell the units, their operations were clearly in pursuit of a common business purpose, albeit to the detriment of the HOA members." *Id.* at 300, 821 S.E.2d at 521.

Because Marick and Thoennes are the only parties appealing this issue, we do not address the trial court's "decision" to amalgamate IMK with IK, Cox, and Lollis. Our de novo review of the evidence compels us to hold the court of appeals erred in affirming the trial court's "decision" to amalgamate IMK, Marick, and Thoennes. *See Pertuis*, 423 S.C. at 655, 817 S.E.2d at 281 (explaining the single business enterprise theory should only be applied after *substantial reflection*). As we held in *Pertuis*, a party seeking to impose the existence of a single business enterprise must show both (1) the intertwining of the operations of the entities and

(2) evidence of "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions."⁶ 423 S.C. at 655, 817 S.E.2d at 280-81.

Specifically, we hold the HOA failed to prove "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions" sufficient to trigger the application of a single business enterprise between IMK, Marick, and Thoennes. The only evidence the court of appeals cited with regard to "bad faith, abuse, fraud, wrongdoing, or injustice" was:

Thoennes, as Marick's principal and license holder, had at least constructive knowledge of the pervasive construction defects that plagued the project, but was nevertheless directly involved in IMK and Marick's marketing and sale of the units. Given that Marick's and IMK's profits were entirely dependent on IMK's ability to sell the units, their operations were clearly in pursuit of a common business purpose, albeit to the detriment of the HOA members.

Stoneledge I, 425 S.C. at 299-300, 821 S.E.2d at 521 (footnote omitted). Viewing the facts of this case with the requisite hesitancy to invade the LLC form, we do not believe these facts warrant the application of the single business enterprise theory. As noted above, in *Pertuis*, we held the single business enterprise theory requires more than just a showing that the various entities' operations are intertwined. A "common business purpose" is simply not enough. 423 S.C. at 653, 817 S.E.2d at 279. For a court to combine different business entities into a single business enterprise, there must also be a showing of "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal

⁶ In *Pertuis*, we adopted the reasoning of the Texas Supreme Court as to the single business enterprise theory. 423 S.C. at 655, 817 S.E.2d at 280. We noted the Texas Supreme Court has enumerated eight nonexclusive factors to be considered in determining whether constituent corporations have not been maintained as separate entities. *Id.* at 652, 817 S.E.2d at 279 n.5 (quoting *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 450-51 (Tex. 2008)). However, as we clearly stated in *Pertuis*, the *Gladstrong* court cautioned "the limitation on liability afforded by the corporate structure can be ignored only when the corporate form has been used as part of a basically unfair device to achieve an inequitable result." *Id.* (internal quotation marks omitted) (quoting *Gladstrong*, 275 S.W.3d at 451).

distinctions." *Id.* at 655, 817 S.E.2d at 281. The conduct of Marick, Thoennes, and IMK did not rise to this level. Like other methods of invading the corporate form, invocation of the single business enterprise theory should be reserved for drastic situations and is the rare exception, not the rule.

For the same reasons, we conclude the evidence does not support a finding of amalgamation of Thoennes with IMK. In addition, we conclude the single business enterprise theory is not to be used to amalgamate an individual with a company. The single business enterprise theory exists as an equitable remedy for plaintiffs whenever they have been wronged by business entities with blurred identities.⁷

Thus, under the facts of this case, we refuse to disregard the corporate form by amalgamating IMK, Marick, and Thoennes, and we therefore reverse the court of appeals on this issue. We express no opinion as to the viability of other methods of invading the LLC form in this case, such as veil piercing or alter ego.

⁷ Other jurisdictions have held the single business enterprise theory is confined to the imposition of "shared liability on entities that are affiliated with a defendant entity" and have refused to apply the theory "to impose liability on individual persons." David J. Marchitelli, Annotation, *Disregard of Separate Existence of Corporations Under Single Business Enterprise Theory*, 50 A.L.R. 7th Art. 2 § 24 (2020); see *Angotti & Reilly, Inc. v. Rincon Residential Towers LLC*, No. A140648, 2015 WL 7294458 (Cal. Ct. App. Nov. 19, 2015) (applying California law); *Manhattan Constr. Co. v. Phillips*, No. 1:09-cv-1917, 2012 WL 13001890 (N.D. Ga. Apr. 9, 2012), *aff'd sub nom. Manhattan Constr. Co. v. Place Properties LP*, 559 F. App'x 856 (11th Cir. 2014) (applying Georgia law); *Nussli US, LLC v. Nola Motorsports Host Comm., Inc.*, No. 15-2167, 2016 WL 4063823 (E.D. La. July 29, 2016) (applying Louisiana law); *Andretti Sports Mktg. La., LLC v. Nola Motorsports Host Comm., Inc.*, 147 F. Supp. 3d 537 (E.D. La. 2015) (applying Louisiana law); *Sun Triangle, Inc. v. Image Stores, Inc.*, No. 96-3877, 1998 WL 252158 (E.D. La. May 15, 1998) (applying Louisiana law); *Spurgeon v. Leleux*, No. 6:11-CV-01807, 2019 WL 138388 (W.D. La. Jan. 8, 2019) (applying Louisiana law); *Medve Energy Ventures LLC v. Warhorse Oil & Gas LLC*, No. 6:17-cv-01336, 2018 WL 7051038 (W.D. La. Nov. 21, 2018), *report and recommendation adopted*, 2019 WL 303122 (W.D. La. Jan. 17, 2019) (applying Louisiana law).

D. Damages

All of the parties argue the court of appeals erred in some manner when it recalculated the trial court's damages award.

The HOA concedes it seeks recovery for a single element of damage—the cost to repair Phase I construction. No one disputes that point. The HOA argued to the jury that it was entitled to \$6,309,197 in damages, corresponding to the amount testified to by its expert. All defendants argued the HOA was entitled to the amount testified to by the defense expert—slightly less than \$4,000,000. The jury awarded the HOA damages as follows:

- \$3,000,000 for negligence against Bostic and IMK/Marick;
- \$1,000,000 for breach of the implied warranty of workmanlike service against Bostic and Marick;
- \$1,000,000 for breach of fiduciary duty against IMK, IK, Thoennes, Lollis, and Cox.

Immediately after these verdicts were read, the trial court sent the jury out in preparation for the apportionment phase of the trial. Counsel for the HOA and the trial court engaged in an exchange that is very important to our review of the trial court's reformation of the jury verdicts:

Counsel for the HOA: I have a question about the verdict. And I was concerned about this occurring. I'm not sure, looking at the verdict, what the jury is awarding me.

Trial Court: They're awarding you what you asked for because you asked for three separate verdicts. Oh, excuse me. I take that back. [Bostic's counsel] asked.

Counsel for the HOA: Yes, sir, he did. And so it is a cumulative award against different defendants of five million dollars?

Trial Court: 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.

There was no explanation of what the word "cumulative" meant. No one asked the trial court to question the jury about its intent behind awarding verdicts in separate amounts nor did anyone ask the trial court to resubmit the damages issue to the jury with the instruction that the dollar amount of damages for each cause of action must be the same.

The apportionment phase of the trial took place immediately thereafter. After jury argument from the parties, apportionment forms for the negligence and breach of warranty claims were submitted to the jury. As to negligence, the jury found IMK/Marick 40% responsible and found Bostic 60% responsible. As to breach of the implied warranty of workmanlike service, the jury found IMK/Marick⁸ 70% responsible and found Bostic 30% responsible. The trial court entered a Form 4 order awarding judgment. The judgment totals on this initial Form 4 mirrored the above-stated verdicts on the three claims (\$3,000,000 + \$1,000,000 + \$1,000,000).

The parties filed numerous timely post-trial motions. In the lead up to the hearing on the post-trial motions, the HOA informed the trial court it had previously received \$2,855,911.77 in settlements from other Phase I defendants. No one disputes that amount.

In its post-trial motion, the HOA requested the trial court to reform the jury's verdict and to amend the initial Form 4 to reflect that the verdicts were "cumulative" by raising the negligence, breach of warranty, and breach of fiduciary duty awards to \$5,000,000 each. The trial court entered a revised Form 4, raising each award to \$5,000,000. The trial court then applied setoff to the negligence, breach of warranty, and breach of fiduciary duty awards and also applied apportionment to the negligence and breach of warranty awards. After setting off

⁸ As we stated in footnote 3, the verdict form first completed by the jury lists "Marick" for the breach of warranty award. The subsequent apportionment form completed by the jury lists "IMK/Marick" for the apportionment of the implied warranty award. This discrepancy is inconsequential for two reasons. First, IMK is not a party to this appeal, and second, no one asked for it to be rectified.

the \$2,855,911.77 in settlements and applying apportionment to the negligence and breach of warranty awards, the trial court entered judgment on those two causes of action as follows: (1) as to negligence, \$2,144,088.23 against Bostic and \$857,635.29 against IMK/Marick and (2) as to breach of the implied warranty of workmanlike service, \$2,144,088.23 against Marick and \$643,226.47 against Bostic. As previously noted, the jury found Bostic 60% responsible for the damages awarded for negligence and found IMK/Marick 70% responsible for the damages awarded for breach of the implied warranty of workmanlike service. In calculating the foregoing figures, the trial court did not apply the apportionment statute to a defendant's share of liability when that defendant was found to be more than 50% responsible. *See* S.C. Code Ann. § 15-38-15(A) (Supp. 2020). However, the trial court did apply the statute to a defendant's share of liability when that defendant was found to be less than 50% responsible.

As to the cause of action for breach of fiduciary duty, the trial court entered judgment on the revised Form 4 in the amounts of \$2,144,088.23 against IMK; \$2,144,088.23 against IK; \$2,144,088.23 against Cox; \$2,144,088.23 against Lollis; and \$2,144,088.23 against Thoennes. This reflects the trial court's application of setoff, but not apportionment, to the breach of fiduciary duty claim.

The court of appeals reversed the trial court, substantially revising the trial court's computation of the various judgments. *Stoneledge I*, 425 S.C. at 302-03, 821 S.E.2d at 522-23.

1. "Cumulative" Verdict

The court of appeals reversed the trial court's decision to increase each judgment to \$5,000,000, holding this invaded the province of the jury. *Id.* at 302, 821 S.E.2d at 522. We agree with the court of appeals on that point.

The HOA argues the court of appeals erred in not affirming "the cumulative verdict of a single damage." The HOA asserts its single damage was the cost to repair the units and that there was no evidence to support a finding of different actual damages for the three causes of action. The HOA contends "[t]he trial judge simply applied the jury's findings, based upon his extensive observation of the trial and the evidence presented, and correctly applied the jury's verdict—\$5,000,000—as the cumulative award for a single damage, regardless of the cause of action." In support of its argument, the HOA cites a now-depublished opinion of the court of

appeals, *Keeter v. Alpine Towers International, Inc.*, Op. No. 2012-UP-692 (S.C. Ct. App. filed June 27, 2012).⁹

In *Keeter*, the plaintiff was severely injured in a fall during a high school recreational field day. *Id.* at *1. The jury returned a verdict for the plaintiff against the lone defendant on three separate causes of action: (1) \$500 in actual damages for strict liability; (2) \$900,000 in actual damages and \$160,000 in punitive damages for negligent design; and (3) \$2,500,000 in actual damages and \$950,000 in punitive damages for negligent training. Before the jury was dismissed, and upon request of the plaintiff, the trial court inquired of the jury whether it intended the three separate actual damages awards be added to result in a total award or whether it intended that the awards be separate for each cause of action. The forelady responded the jury intended for the awards to be "cumulative," or added together. The trial court asked the same question as to punitive damages, and the forelady responded in the same fashion. The defendant did not ask for further clarification. The court of appeals held that in the context that the plaintiff sought and could receive only one damages award for the same injury, the dialogue between the trial court and the forelady established the jury intended the damages awards for each cause of action be added together for a total award of \$3,400,500 actual damages and \$1,110,000 punitive damages. *Id.* at *12.

The HOA seizes upon its and the trial court's use of the word "cumulative" immediately after the jury was released to establish all parties agreed at that time that each of the three verdicts were actually \$5,000,000. We disagree. In light of the parties' reliance during the trial upon *Keeter*, which, again, was a published decision at the time of this trial, it was reasonable for the defendants to conclude the trial court intended the breach of warranty and negligence verdicts against Bostic and IMK/Marick to be added together to amount to \$4,000,000 and the

⁹ Normally, we would not consider arguments citing to an unpublished decision. However, *Keeter* was a published decision at the time of this trial, and a petition for certiorari was pending in this Court when the instant case was tried. The trial court and the parties relied upon *Keeter* when the instant case was tried; however, while the petition for certiorari was pending with this Court to review *Keeter*, the parties in *Keeter* submitted a joint motion to dismiss. Two years after this case was tried, the Court granted the parties' joint motion and ordered the court of appeals' opinion to be depublished. See *Keeter v. Alpine Towers Int'l, Inc.*, 410 S.C. 445, 766 S.E.2d 375 (2014).

breach of fiduciary duty verdicts against the remaining defendants to remain at \$1,000,000.¹⁰

In the case before us, the parties agree the HOA sought and could receive only one actual damages award for each cause of action. However, no party asked the trial court to request the jury for any clarification of the verdicts. The HOA submits no authority to support the trial court's reformation of the jury's verdict without receiving the input of the jury and relies upon the trial court's "extensive observation of the trial and the evidence presented." *See Joiner v. Bevier*, 155 S.C. 340, 355, 152 S.E. 652, 657 (1930) ("A jury's verdict should be upheld, when it is possible to do so, and carry into effect what was clearly the jury's intention. It is our duty to enforce a verdict, not to make it." (internal citation omitted)); *Camden v. Hilton*, 360 S.C. 164, 173, 600 S.E.2d 88, 92 (Ct. App. 2004) ("[I]t is not for the trial court to say what it thinks the verdict should be."). Did the jury find the HOA proved damages of \$5,000,000 for each cause of action, as the HOA claims? Perhaps, but perhaps not. Did the jury find the HOA proved damages of \$4,000,000? Perhaps, but perhaps not. Absent further dialogue with the jury, there was simply no way for the trial court to tell without speculating what the jury intended.

The trial court erred in reforming the verdicts on its own, absent a request from a party to resubmit the case to the jury with instructions that the dollar amounts for each verdict had to be the same. *See Rhame v. City of Sumter*, 113 S.C. 151, 154, 101 S.E. 832, 833 (1920) ("While the verdict is unusual, no effort was made to correct it before the jury had separated. His honor would have done so had he been requested to find out just what the jury meant, and had the verdict reformed."), *overruled on other grounds by Rourk v. Selvey*, 252 S.C. 25, 164 S.E.2d 909 (1968); *Anderson v. Aetna Cas. & Sur. Co.*, 175 S.C. 254, 282, 178 S.E. 819, 829 (1934) ("The law rather forbids this court assuming to take upon

¹⁰ The court of appeals also noted Marick's argument that the HOA should have been required to elect a remedy between the three causes of action. The court held Marick's argument was unpreserved because Marick did not object to the trial court's ruling that the awards were "cumulative." However, the court of appeals went on to hold that setoff should be applied proportionately to the three awards as to all defendants, including Marick. We agree with this method of setoff under the facts and posture of this case, and we conclude it moots Marick's election of remedies argument.

itself the powers, duties, rights, and privileges of a jury." (quoting *Sanders v. Commonwealth Life Ins. Co. of Ky.*, 134 S.C. 435, 440, 132 S.E. 828, 830 (1926)); *Allegro, Inc. v. Scully*, 400 S.C. 33, 49, 733 S.E.2d 114, 123 n.9 (Ct. App. 2012) ("If a jury verdict form is ambiguous or unclear, the jury should be returned to the jury room in order to clarify or conform the verdict to its intent before the jury is excused.").

The court of appeals correctly held the trial court invaded the province of the jury by reforming the verdicts on its own. *Stoneledge I*, 425 S.C. at 302, 821 S.E.2d at 522. We hold the silence of the defendants in the face of the trial court's statement that the verdicts were "cumulative" was of no significance because, in light of *Keeter*, the term "cumulative" was subject to a different meaning from what the plaintiff and the trial court intended. It was entirely reasonable for defense counsel to take the trial court's comment as its conclusion that the verdicts would be added together, as the verdicts were in *Keeter*. Because no party requested the trial court resubmit the verdict forms to the jury with instructions to make the verdicts consistent, we affirm the court of appeals' holding that the three verdicts must stand as delivered by the jury. We repeat that this entire problem and the appellate distress it has caused could have been avoided if just one party had requested the trial court to resubmit the verdicts to the jury with instructions to make them consistent.

We now turn to the application of setoff to the three verdicts.

2. Setoff

South Carolina courts have consistently held "there can be only one satisfaction for an injury or wrong." *Smith v. Widener*, 397 S.C. 468, 471, 724 S.E.2d 188, 190 (Ct. App. 2012) (quoting *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998)). "Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury." *Id.* at 471-72, 724 S.E.2d at 190 ("When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law."). "The right of setoff has existed under the common law for over 100 years." *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015).

The Uniform Contribution Among Tortfeasors Act (the Act) "represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" *Id.* at 196, 777 S.E.2d at 830 (quoting *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010)). Section 15-38-50 of the Act codifies the principle of setoff for settlements paid by persons liable in tort to another:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50 (2005).

a) Application of Setoff to the Breach of Fiduciary Duty Award

The trial court applied setoff to the breach of fiduciary duty award against Thoennes, but the court of appeals reversed concluding that because none of the defendants who settled with the HOA before and during trial were sued for breach of fiduciary duty, none of the settlement proceeds included damages directly resulting from breach of fiduciary duty. *Stoneledge I*, 425 S.C. at 302-03, 821 S.E.2d at 523. We agree setoff does not apply to the breach of fiduciary duty award, but we reach this conclusion for a different reason.

The HOA contends that because the damages it sought for each cause of action and because all the settlements it received were for the same injury—cost of repair—setoff applies to the breach of fiduciary duty award. Bostic, Marick, and Thoennes argue setoff should not apply to the breach of fiduciary duty award,

citing subsection 15-38-20(G) of the Act, which provides, "This chapter does not apply to breaches of trust or of other fiduciary obligation." We agree with Bostic, Marick, and Thoennes.

As we noted above, "[t]he right of setoff has existed under the common law for over 100 years." *Riley*, 414 S.C. at 195, 777 S.E.2d at 830. We noted in *Rutland v. South Carolina Department of Transportation* that allowing a setoff "prevents an injured person from obtaining a double recovery for the damage he sustained, for it is 'almost universally held that there can be only satisfaction for an injury or wrong.'" 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (quoting *Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.C.2d 740, 746 (1975), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985)). The provisions of subsection 15-38-20(G) prohibiting the application of setoff to a breach of fiduciary duty award are in derogation of this common law principle. We recently cited the settled rule that "[s]tatutes in derogation of the common law are to be strictly construed[.]" and "[u]nder this rule, a statute restricting the common law will not be extended beyond the clear intent of the legislature." *Eades v. Palmetto Cardiovascular & Thoracic, PA*, 422 S.C. 196, 201, 810 S.E.2d 848, 850 (2018) (internal quotation marks omitted) (quoting *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012)).

The Act is a part of Chapter 38. In fact, the Act is the only statutory scheme in Chapter 38. The Act governs the setoff of prior settlements paid by tortfeasors, and breach of fiduciary duty is a tort. Because subsection 15-38-20(G) of the Act provides Chapter 38 does not apply to breaches of trust or other fiduciary obligation, the General Assembly clearly intended Chapter 38 to prohibit the application of setoff to a breach of fiduciary duty award. Therefore, we hold the \$1,000,000 breach of fiduciary duty award against Thoennes is not subject to setoff.

b) Application of Setoff to the Breach of Warranty Award

Bostic argues the court of appeals erred in holding setoff applies to the breach of warranty award. Bostic asserts that only the negligence award should be subject to setoff. Bostic contends setoff is only available for tort claims and because breach of warranty is a contract claim, setoff is inapplicable.

Bostic is correct that claims for negligence sound in tort and claims for breach of warranty generally sound in contract. Bostic is also correct that the Act

discusses setoff in the context of tort claims. *See* § 15-38-50 (explaining setoff is available for "tortfeasors" who are "liable in tort"). The Act governs the setoff of prior settlements paid by those liable in tort, not those liable in contract. However, nothing in the Act prohibits the application of common law setoff to a claim founded in contract. *See Riley*, 414 S.C. at 195, 777 S.E.2d at 830 ("The right to setoff has existed at common law in South Carolina for over 100 years."). Therefore, setoff can be applied to the breach of warranty award.

c) Application of Setoff to the Negligence Award

All parties agree setoff applies to the negligence award. The parties disagree as to the setoff figures to be applied to calculate the final judgments. We make those calculations below in subsection D.4 (Judgment Amounts).

3. Apportionment

Subsection 15-38-15(A) of the Act provides for apportionment of liability among joint tortfeasors arising from tortious conduct:

In an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. 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.

S.C. Code Ann. § 15-38-15(A) (Supp. 2020). In this subsection, "the legislature abrogated pure joint and several liability for joint tortfeasors who are less than fifty

percent at fault." *Smith v. Tiffany*, 419 S.C. 548, 552-53, 799 S.E.2d 479, 481 (2017).

As noted, breach of warranty claims generally sound in contract, not in tort, so the breach of warranty verdict was not subject to apportionment. However, at trial, the parties agreed the jury should apportion responsibility for the breach of warranty award between Bostic and Marick. Under subsection 15-38-15(A), Bostic is liable for the entire negligence verdict of \$3,000,000, and Marick is liable for its apportioned share of \$1,200,000. Marick is liable for the entire \$1,000,000 breach of warranty verdict, and Bostic is liable for its apportioned share of \$300,000. As we will now discuss, these amounts must be adjusted to take into account (1) pro rata allocation between the verdicts for these two causes of action and (2) setoff of the prior settlements.

4. Judgment Amounts

The jury awarded \$3,000,000 for negligence; \$1,000,000 for breach of the implied warranty of workmanlike service; and \$1,000,000 for breach of fiduciary duty, for a total award of \$5,000,000. The HOA received \$2,855,911.77 in settlements from other Phase I defendants. Had the jury been instructed to return one consistent verdict of actual damages, the application of setoff and the calculation of the net judgments after apportionment would have been simple. However, we find it appropriate to apply a pro rata allocation of the \$2,855,911.77 setoff to the negligence and breach of warranty verdicts. Of course, we must also take into account the apportionment percentages rendered by the jury.

The court of appeals correctly held—but, as discussed above, for the incorrect reason—that the breach of fiduciary duty verdict against Thoennes was not subject to setoff. *Stoneledge I*, 425 S.C. at 302-03, 821 S.E.2d at 523. The court of appeals also correctly held the \$4,000,000 in combined verdicts against Bostic and Marick were subject to setoff in the amount of \$2,855,911.77. *Id.* However, the court of appeals mistakenly concluded this calculation would leave a \$2,144,088.23 net judgment to be allocated between the negligence and breach of warranty verdicts. *Id.* The correct figure is \$1,144,088.23. The court of appeals correctly held "it would be proper to allocate three-fourths of the remaining judgment to the negligence cause of action and the remaining one-fourth to the [breach of warranty] cause of action." *Id.*

As noted above, during the apportionment phase, the jury found Bostic was 60% responsible for the negligence award, Marick was 40% responsible for the negligence award, Marick was 70% responsible for the breach of warranty award, and Bostic was 30% responsible for the breach of warranty award. Under subsection 15-38-15(A) of the Act, a defendant whose conduct is found to be less than fifty percent of the total fault is liable for only that percentage of the damages determined by the fact finder. Joint and several liability is assigned to defendants found liable for fifty percent or more of the damages. After applying the correct setoff, the apportionment percentages determined by the jury, and the apportionment statute, we hold the resulting judgments to be entered are as follows:

- Bostic: \$858,066.17 for negligence (joint and several liability for prorated verdict after setoff) and \$85,806.62 for breach of warranty (30% of prorated verdict after setoff)
- Marick: \$286,022.06 for breach of warranty (joint and several liability for prorated verdict after setoff) and \$343,226.47 for negligence (40% of prorated verdict after setoff)
- Thoennes: \$1,000,000 for breach of fiduciary duty (no setoff applied)

These figures do not take into account the HOA's monetary settlements (if any) with IMK, IK, Cox, and Lollis during the pendency of this appeal.

CONCLUSION

Based on the foregoing, we affirm in part and reverse in part the court of appeals. We remand this matter for final calculation and entry of judgment consistent with our opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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, 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; Herberito
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 Appellants.

Appellate Case No. 2015-000392

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5600
Heard December 7, 2017 – Filed October 10, 2018

AFFIRMED IN PART, REVERSED IN PART

Jason Michael Imhoff, Chad McQueen Graham, and Carl Reed Teague, all of The Ward Law Firm, PA, of Spartanburg, for Appellants.

Robert T. Lyles, Jr., of Lyles & Associates, LLC, of Charleston, for Respondent.

LOCKEMY, C.J.: In this construction defect case, Marick Home Builders, LLC (Marick) and Rick Thoennes appeal several of the trial court's orders arguing the trial court erred by (1) failing to give certain jury charges; (2) failing to grant their directed verdict motions; (3) improperly limiting their closing argument; (4) amalgamating the interests of several defendants; (5) failing to require Respondents to elect a remedy; and (6) failing to properly set off settlements Respondents received prior to trial. We affirm in part and reverse in part.

FACTS

In 2002, Bostic Brothers Construction, Inc. (Bostic) began construction as the general contractor on Stoneledge, a townhouse community on Lake Keowee. Bostic marketed the properties as "quality construction" and "maintenance free." Bostic stated, "The quality and attention to detail of the cedar and stacked-stone homes are just as breathtaking as the views." Bostic also noted "Your homeowner[']s association dues cover both maintenance of the grounds and the exterior of your home leaving you more time to enjoy the lake and surrounding attractions." Several of the units were sold in 2003, but the attempts to sellout were "erratic at best."

By late 2004, Bostic was having difficulties finishing other jobs and had to cease operations at Stoneledge. According to property owners at Stoneledge, when Bostic left in 2004, there were "a number of issues." Steven Taylor, a property owner at Stoneledge, testified "[i]t was like a ghost town." He stated property owners were concerned about whether electricity bills were being paid, whether the septic system would work properly, and who was responsible for keeping the common areas landscaped. Taylor testified Bostic had completed the exteriors of the remaining units, but had not completed the interiors when it abandoned the project.

In 2005, IMK Development Company purchased the property from Bostic, and Marick Home Builders, LLC took over the building responsibilities for Stoneledge. Marick's site superintendent, Nathan Hornaday, testified he walked through the unsold units and noted existing damage and what needed to be fixed. According to Hornaday, the exterior of the units, including the roof, porches, decks, and siding were installed in all of the homes and only two or three units needed doors or windows installed.

Hornaday testified that when he arrived on the Stoneledge site, he observed leaks around the porches and decks. Taylor testified he too noticed leaks on his porch and deck. Additionally, Hornaday stated he observed water damage inside the unfinished units, not associated with the porches. He believed that the water damage was the result of broken or missing windows and doors. Hornaday alerted Marick, and one of its principals, Rick Thoennes, about the issues. Marick pulled permits for the unfinished units to complete construction. Marick also hired Coleman Waterproofing to rectify the leaks on the decks and porches by applying a

waterproof coating to the concrete. According to Marick, the waterproofing appeared to rectify the issue.

In 2005, IMK created a homeowners association (HOA) for Stoneledge. At that time, the HOA Board was comprised of IMK representatives, including Thoennes. The HOA conducted regular business, but the homeowners did not have much interaction with the Board. The HOA performed maintenance to the units, but progress was sometimes slow. The IMK/Marick representatives of the Board turned over the HOA to the homeowners in late 2008.

In the spring of 2009, the homeowner-controlled Board began receiving complaints of leaks on the decks and porches. Some homeowners also noticed water running through the crawl-space of their homes during heavy rains. The HOA completed destructive testing on the porches and decks and found significant damage. The HOA also found hidden rot caused by water intrusion to structural columns, and homeowners began reporting interior damage caused by water infiltration from the roof.

In February 2010, the HOA filed an action against Bostic, IMK, Marick, and other development entities, subcontractors and individuals. The HOA settled with some defendants, but went to trial against Bostic, IMK, Marick and the original IMK/Marick board members, alleging negligence, breach of implied warranty of workmanlike service, breach of implied warranty of habitability, and breach of fiduciary duty.

At trial, the HOA requested the jury return a verdict for \$6,309,197 for the full amount required to bring the damaged buildings up to the quality at which they were marketed. After deliberations, the jury returned a verdict in favor of the HOA for a total of \$5,000,000: \$3,000,000 on the negligence cause of action against Marick and Bostic, \$1,000,000 on the breach of implied warranty cause of action against Marick and Bostic, and \$1,000,000 for the breach of implied warranty cause of action against Marick. Following post-trial proceedings to allocate fault and setoff settlement funds, the trial court entered revised judgments. This appeal followed.

LAW/ANALYSIS

A. JURY CHARGES

"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) (quoting *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Id.* (quoting *Cole*, 378 S.C. at 404, 663 S.E.2d at 33).

"A trial court must charge the current and correct law." *Id.* (quoting *In re Estate of Pallister*, 363 S.C. 437, 451, 611 S.E.2d 250, 258 (2005)). "Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." *Id.* (quoting *Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000)). "However, jury instructions should be confined to the issues made by the pleadings and supported by the evidence." *Id.* "A trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal." *Id.* (quoting *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005)).

"When an appellate court reviews an alleged error in a jury charge, it 'must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.'" *Id.* (quoting *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999)). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *Id.* at 198, 781 S.E.2d at 542 (quoting *Keaton*, 334 S.C. at 497, 514 S.E.2d at 575). "This holistic approach to jury instructions is linked to the principle of appellate procedure that '[a]n error not shown to be prejudicial does not constitute grounds for reversal.'" *Id.* (quoting *Ardis v. Sessions*, 383 S.C. 528, 532, 682 S.E.2d 249, 250 (2009)).

If the record does not contain any proposed jury charges, and it does not reflect that Appellant proffered any proposed jury charges, the issue is not preserved. *Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs*, 347 S.C. 545, 556, 556 S.E.2d 718, 724 (Ct. App. 2001).

Marick argues the trial court erred by (1) not charging the jury that Marick could be held liable only for work it performed, (2) charging the jury on breach of implied warranty of habitability, even though that cause of action had been dismissed, (3) and failing to give its requested jury charge on the breach of fiduciary duty cause of action. We disagree.

1. Liability Charge

Marick asserts "[t]he trial court failed to charge the jury on the proper elements of negligence for a subsequent owner for original construction defects or similar limitations for breach of implied warranty of workmanlike service." The HOA, on the other hand, asserts Marick failed to preserve its argument because it did not proffer a proposed jury charge to the trial court prior to the court's charge to the jury.

In *Round Tree Villas Association v. 4701 Kings Corporation*, our supreme court determined whether a lender, that took control of a project in lieu of foreclosure from the builder, could be held liable for negligent work by the builder prior to the lender taking title to the property. 282 S.C. 415, 418-419, 321 S.E.2d 46, 48-49 (1984). The *Round Tree Villas* court refused to impose liability in such a case. *Id.* at 422, 321 S.E.2d at 50. Instead, the court found the lender could only be held responsible for its acts of negligence in repairing any issues. *Id.* at 423, 321 S.E.2d at 51. "Under this cause of action the Lender . . . may only be held liable for any damages proximately caused by the alleged negligent repair, but not for any original damages proximately caused by the negligence of the Builder, Architect or Contractor." *Id.*

During trial, Hornaday, Marick's site superintendent, and Taylor, a resident of Stoneledge, each testified the exteriors of many of the Phase I units were already constructed when Marick took over the project in 2005. But, Hornaday also testified he observed water damage in unfinished units and leaks around some porches and decks. Furthermore, he acknowledged Marick pulled permits to complete construction at Stoneledge totaling \$1.4 million, including some that stated the work was to "complete townhome from foundation stage."

During the charge conference, the court stated it would charge the elements of negligence. Specifically, the court stated, "I'll charge as far as the elements of damages the negligence is the cost of repairs and incidental and consequential damages." The court then noted, "Have we got any -- I don't know about the duty to exercise reasonable care in making repairs." The HOA told the trial court, "That would be relevant to the claims against Marick." Marick responded, "We put the *Roundtree Villas* case in there, I believe." Later during the charge conference, the court noted it would charge the jury "the burden of proof is upon the plaintiff to prove not only that there was negligence, but that the named defendant or defendants were the cause of that [damage]." Again, Marick argued to the trial court it should include a charge from *Roundtree Villas* regarding "liability of

subsequent builder making repairs." The court noted it could not find the proposed charge but Marick quoted from the charge that

One who undertakes to make repairs [sic], the defective components of a construction project is not liable for the negligence of the prior builder or contractor. The entity who assumes to make repairs to defective components is only liable for damages proximately caused by alleged negligent repair but not for any original damages proximately caused by the negligence of a builder or contractor.

The trial court declined to charge the language from *Roundtree Villas* because it involved a lender that took title to property, not a subsequent builder.

With regard to the HOA's issue preservation argument, we find Marick sufficiently proffered its requested charge to the trial court. While there was some discussion that the charge was not included in Marick's requests sent to the court prior to the charge conference, Marick sufficiently brought to the trial court's attention the requested content of the charge, and there is a sufficient record for this court to review it. Therefore, we find this issue has been sufficiently preserved for our review.

On the merits, the trial court charged the jury the correct statement of the law in South Carolina regarding builder negligence and liability. While we agree with Marick it may have been helpful to include the language from *Roundtree Villas* in the charge to the jury, after reviewing the entire jury charge, we find no error under the specific facts of the case.

The trial court charged the jury on the general elements of negligence. The court specifically charged the jury "[t]he plaintiffs must also prove by a preponderance or the greater weight of the evidence that they suffered damages as a result of the defendants' breach of duty." The trial court continued by instructing the jury on proximate cause. The court instructed, "The plaintiffs must prove by a preponderance of the evidence that the damages were proximately caused by the defendants' breach" and the plaintiffs must prove causation in fact "by showing that the damages would not have occurred but for the defendants' negligence." The court also charged the jury that a plaintiff must prove a builder negligently constructed a building and "the negligence or carelessness of the defendants in performing the construction work was a proximate cause of the damages sustained

by the plaintiff."¹ Finally, the court instructed, "If [two] acts happened one after the other, but not related to each other, they would not be concurring causes. In that case, only one person whose negligence actually caused the injury would be responsible."

Taken as a whole, these charges adequately instructed the jury on the law of South Carolina. Marick's requested charge is certainly appropriate here, but the court's charge as given instructed the jury that only the person or entity whose negligence caused the injury would be responsible. Accordingly, we affirm.

2. Breach of Implied Warranty of Habitability

Marick argues the trial court erred in charging the jury on the law of implied warranty of habitability because the breach of implied warranty of habitability claim had been dismissed prior to trial. The HOA asserts the trial court's error was harmless because no cause of action for breach of implied warranty was included on the verdict form. We agree with the HOA.

The HOA initially asserted a cause of action against the Stoneledge developers for breach of implied warranty of habitability. The trial court, however, granted the developers summary judgment on the breach of implied warranty of habitability prior to trial.

In preparing its jury instructions, the trial court stated it planned to charge the jury on four causes of action, including a charge for breach of the implied warranty of habitability. Marick then asked "Does anybody think there's a work habitability claim still out there?" The HOA responded, "Your Honor, I think that you dismissed the habitability claim by earlier order." The trial court agreed.

However, during the charge, the trial court instructed the jury,

A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, and workmanlike manner. This is an implied warranty of workmanlike services, and it exists as a matter of law. The implied warranty o[f]

¹ The trial court instructed the jury on multiple other occasions that a defendant is only liable for damages for which the defendant was the proximate cause; however, for the sake of brevity, we list only a sampling of those charges.

workmanlike manner is a duty to perform the work skillfully, carefully and diligently. The work need not be performed to absolute perfection or to the personal satisfaction of either party, but it must be performed to the satisfaction of the contract. The skill required of a person providing services is the same degree of skill, efficiency and knowledge of those of ordinary skill, competence and standing in the particular trade, profession or business in which the person is working. If you find the construction was defective by reason of the builder's workmanlike performance, the breach of warranty gives a plaintiff a claim for damages for the loss of his expectancy.

The plaintiffs alleged that there has been a breach of the implied warranty of workmanlike service and a breach of implied warranty of habitability. An implied warranty is one which is presumed to be included in every sale, whether the defendant actually stated the promise or not. The proper measure of damages for the breach of an implied warranty is the actual damages shown to have been sustained by the plaintiff which are the natural, direct and proximate cause of the breach of the implied warranty and which may be reasonably regarded as within the contemplation of the parties at the time [sic] the warranty as a probable consequence of the breach of this warranty.

In the court's instruction on damages for the breach of implied warranty cause of action, the trial court did not indicate a specific implied warranty, instead noting "[i]ncidental damages from a breach of implied warranty may be recovered."

After the charge, Marick noted its exception to the breach of implied warranty of habitability language. Marick acknowledged the implied warranty of habitability issue was a "small one" that was "buried in other charges." After deliberating, the jury requested the trial court "provide the jury charge for breach of implied warranty of workmanlike service and [the trial court's] charge for breach of fiduciary duty." The court repeated these charges at the jury's request. After the court's recharge on the law, Marick again objected to the implied warranty of

habitability reference. The trial court noted the error, but found there was no injury to Marick because the term was only mentioned one time in the section.

We agree with the trial court's assessment. The jury charge only included the phrase breach of implied warranty of habitability once; it did not define the concept or give any elements for it with respect to a separate cause of action. Further, the jury specifically requested the trial court recharge the issue of breach of warranty of workmanlike service, not mentioning the warranty of habitability. While inclusion of the phrase was error, we find Marick has failed to establish any prejudice resulting from the trial court's passing references to the breach of warranty of habitability in this case.

3. Breach of Fiduciary Duty

Marick argues the trial court gave an erroneous jury charge on the breach of fiduciary duty cause of action, which essentially converted breach of fiduciary duty into a strict liability cause of action. Based on the trial court's erroneous breach of fiduciary duty charge, Marick also asserts the trial court erred by not giving its requested charge on the business judgment rule. The HOA asserts the breach of fiduciary duty claim presented in this case is controlled by our supreme court's decision in *Concerned Dunes West Residents v. Georgia-Pacific Corporation*, 349 S.C. 251, 562 S.E.2d 633 (2002). We agree with the HOA.

In *Dunes West*, a developer created a planned unit development (PUD) governed by recorded covenants and restrictions. *Id.* at 254, 562 S.E.2d at 635. During development, the developers constructed roads and drainage systems. *Id.* Subsequently, the developer discovered significant repairs to the roads and drainage systems would be necessary. *Id.* at 255, 562 S.E.2d at 635. Before repairing the issues, the developer sold the remaining undeveloped portions to a buyer. *Id.* Prior to consummating the sale, the developer deeded the roads and other common areas within the development to the property owners association (POA). *Id.* Pursuant to the covenants, the POA was responsible for maintaining all common areas within the PUD. *Id.* at 255, 562 S.E.2d at 636. The POA later sued the developer to recover the costs to repair the roads and other common areas. *Id.*

The court noted,

the developer of a planned unit development . . . owes a
fiduciary duty to the property owners association and its

members, much like that owed by promoters of a corporation to investors. As such, the developer has a responsibility to insure that the common areas are in good repair at the time they are conveyed to the property owners association or to provide the association with funds sufficient to effectuate any needed repairs to those areas.

Id. at 256, 562 S.E.2d at 636. "The developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard." *Id.* at 257, 562 S.E.2d at 637. Under this legal framework the court found the developer liable to the POA for the road construction defects. *Id.*

Here, the trial court instructed the jury "The developer owes a fiduciary duty to ensure that the common areas of the development are in good proper repair at the time the developer relinquished control of the homeowners association over to the homeowners."

Marick asserts, "The charge given by the [trial] [c]ourt is not an accurate statement of the law of South Carolina, and it incorrectly expresses and implies that such a duty by a developer is akin to strict liability for defects, whether latent or patent." Marick argues "there was no evidence that Thoennes or the other members of the HOA Board[] had any knowledge of unrepaired defects at the Project at the time control of the HOA Board was transferred to the homeowners in 2007." Marick also argues the trial court should have instead charged the jury that "the conduct of the directors should be judged by the 'business judgment rule'; and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action."

The trial court properly instructed the jury regarding the fiduciary duty a developer owes to an HOA when it controls the HOA. The HOA presented evidence that Marick knew about water infiltration issues, and even attempted to fix them prior to turning the HOA over to the homeowners. Because the circuit court properly charged the jury according to our supreme court's holding in *Dunes West*, we affirm.

B. DIRECTED VERDICT MOTIONS

"When reviewing a trial court's ruling on a directed verdict motion, this court will reverse if 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, 691 S.E.2d 170, 173 (Ct. App. 2010). "When reviewing the trial court's decision on a motion for directed verdict, this court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Id.* "The trial court must deny a directed verdict motion where the evidence yields more than one inference or its inference is in doubt." *Id.*

1. Breach of Implied Warranty of Workmanlike Service

"In constructing a home, a builder warrants that the home is fit for its intended use as a dwelling, that the home is constructed in a workmanlike manner, and that the home is free of latent defects." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 562, 658 S.E.2d 80, 88 (2008).

Marick argues it was entitled to a directed verdict on the breach of implied warranty claim because "[t]here was no evidence presented that Marick constructed the defective exteriors of the units." The HOA notes it did not sue Marick seeking to hold it vicariously liable for Bostic; rather, it sued Marick "for its own negligence and breaches of warranty with respect to the significant work it did in Phase 1 of Stoneledge." The HOA explains it has "not contended that Marick is a warrantor of Bostic's work."

Several homeowners testified they notified the Marick board members regarding issues with their units. The HOA also presented evidence that Marick pulled building permits detailing \$1.4 million in construction necessary to complete the units in Phase 1 and perform repairs; some of this work included completing buildings from the foundation stage. This evidence was sufficient to overcome Marick's motion for a directed verdict and raised a question of fact for the jury to decide. Accordingly, we affirm.

2. Proximate Cause

"Negligence is not actionable unless it is a proximate cause of the injury." *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 146, 638 S.E.2d 650, 662 (2006). "[P]roximate cause is the efficient, or direct, cause[;] the thing which brings about the injuries complained of." *Hughes v. Children's Clinic, P. A.*, 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). "The defendant's negligence does not

have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury." *Madison*, 371 S.C. at 147, 638 S.E.2d at 662. "Normally, proximate cause is a question of fact for the jury, and it may be proved by direct or circumstantial evidence." *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006).

Marick acknowledges the existence of "limited evidence that any repairs made by Marick were defective and proximately caused damages." However, Marick argues the trial court erred in failing to grant it a partial directed verdict on the negligence claim because the extent of its liability for construction defects was \$250,000. The HOA asserts it presented evidence of Marick's "failure to comply with the code in performance of over \$1.4 million worth of completion work; its extensive, failed efforts to repair waterproofing on the porches and decks and foundation; and its disregard of open and obvious deficiencies" its superintendent saw but did not repair, which led to damages.

The HOA's forensic engineer, Derek Hodgins testified he examined the units in Stoneledge and found a number of issues. On his first inspection of Stoneledge, Hodgins found issues with water intrusion on the decks and porches, flashing issues, and siding issues. Hodgins also testified he discovered a significant amount of damage to paneled subfloors and floor framing caused by water intrusion. Finally, Hodgins noted there were inappropriately constructed fire-rated walls which he could observe in an unfinished unit inspection.

Hodgins analyzed the plans and permits pulled in this case and determined Marick used out of date building codes when it applied for twenty-six building permits in 2005, although "there [was] really no substantial or substantive difference between the two codes . . . for any of the issues" in this case. He also noted several problems with the amount of detail on the plans, and stated the builders should have contacted the architect to clarify those points.

Finally, Hodgins testified the homeowner's reports of water intrusion should have put Marick on notice to sufficiently investigate to determine the source of the water intrusion. According to Hodgins, to completely fix the issues Stoneledge faces, it would require the removal of all the exterior wall material, and its subsequent reapplication using proper flashing and waterproofing details.

We acknowledge several witnesses testified the exteriors of the homes were already constructed when Marick took over at Stoneledge. We also note the

HOA's expert testified a large portion of the damages would not have been any different had Marick done nothing to attempt repair. The HOA's expert testified,

Certain things wouldn't change at all. The need for fire-rated walls to be correct would not change. The need for every window to be removed and reset with proper flashing would not change. The waterproofing of the foundation walls would not change. The balcony reconstruction, I don't think would change. There may have been -- you may have had some framing to salvage in the balconies in 2004. I don't know. But other than that it would be same fix.

However, Hodgin also testified Marick had a duty to properly investigate issues and make repairs as the subsequent general contractor when it knew of problems.

Marick's expert testified the repairs identified by the HOA's expert which were attributable to Marick would cost \$250,000 to repair. The record does not indicate that the HOA's expert broke down his damages opinions between Bostic and Marick.

Mindful of our standard of review, we find evidence in the record to support the jury's determination that Marick was the proximate cause of Stoneledge's damages, and those damages exceeded \$250,000. The most apparent evidence supporting the jury's decision are the permits for construction Marick requested, at least one of which was to completely construct a new unit. While the HOA's expert may not have taken time to delineate which damages were due to Bostic's negligence and which damages were due to Marick's negligence, we find there was evidence to support the jury's verdict. Therefore, we affirm the trial court's decision declining to grant directed verdict.

C. CLOSING ARGUMENT

"Closing arguments must be confined to evidence in the record and reasonable inferences therefrom." *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 352, 638 S.E.2d 96, 102 (Ct. App. 2006) (quoting *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997)). A trial court is allowed broad discretion in dealing with the range and propriety of closing argument to the jury. *Id.* (quoting *State v. Condrey*, 349 S.C. 184, 195-96, 562 S.E.2d 320, 325 (Ct. App. 2002)).

Ordinarily, the trial court's rulings on such matters will not be disturbed. *Id.* (quoting *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997)).

Marick argues the trial court improperly restricted its closing argument regarding the HOA's expert witness. Marick asserts there was no need to use the deposition during the trial because the expert admitted the content of his previous deposition testimony in a different case, and impeachment was therefore not necessary.

Marick made only conclusory statements and quoted the discussion between counsel and the court during the closing argument, without any citation to supporting authority. Therefore, this issue has been abandoned. *See Glasscock, Inc. v. U.S. Fidelity & Guar. Co.*, 348 S.C., 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

D. AMALGAMATION (Single Business Enterprise Theory)

Marick argues the trial court's decision to amalgamate its interests with IMK was erroneous, unsupported by the evidence, and "created a multitude of problems involving the jury charges (or lack thereof), the verdict form and both judgments entered by the trial court."²

The amalgamation of interests theory was first addressed in South Carolina in *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986); however, our supreme court only formally recognized amalgamation—or the "single business enterprise theory"—as a method of piercing the corporate form in the recent case of *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018). In *Pertuis*, the court summarized the doctrine as follows:

where multiple corporations have unified their business operations and resources to achieve a common business purpose and where adherence to the fiction of separate

² Plaintiffs also sued Marick and Rick Thoennes—Marick's principal and license holder—directly for their active fault. It appears that only Larry Lollis, a passive investor in IMK through Integrys Keowee Development, was actually impacted by the trial court's amalgamation of the interests with respect to the breach of fiduciary duty claim. Lollis, Cox, and Integrys Keowee are not parties to the appeal.

corporate identities would defeat justice, courts have refused to recognize the corporations' separateness, instead regarding them as a single enterprise-in-fact, to the extent the specific facts of a particular situation warrant.

Id. at 652-53, 817 S.E.2d at 279. Noting there is nothing "remotely nefarious" in forming corporations for the purpose of shielding shareholders from individual liability, our supreme court reasoned that amalgamation "requires a showing of more than the various entities' operations are intertwined"; rather, it requires "further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* at 655, 817 S.E.2d at 280-81.

In this case, although the trial court lacked the benefit of our supreme court's decision in *Pertuis*, we agree it failed to conduct any meaningful analysis supporting an amalgamation of interests. Nevertheless, our review of the record reveals evidence of a unified operation between Marick and the amalgamated parties as well as evidence of self-dealing that resulted from a blending of their business enterprises.

The threshold amalgamation issue "is an assessment of whether these entities actually operate as a single business enterprise, and thus should be treated as a single entity." *Id.* at 650, 817 S.E.2d at 278. Here, there was testimony Integrys Keowee and Marick were corporately affiliated under the umbrella of IMK, passed corporate funds directly between one another, and allowed individual members to operate as dual agents without distinction as to who they represented. Specifically, Integrys Keowee managing shareholder Bill Cox testified IMK was created to hold title to the Stoneledge project. "Marick Home Builders was to provide the construction at their cost, and [Integrys Keowee] provided the investment. And we did the books for IMK. And the agreement was we would split the profits." Cox was a managing member of both Integrys Keowee and IMK; Integrys Keowee and Marick each owned 50 percent of IMK. IMK had no business other than the development of Stoneledge.

Cox was also a partner in Integrys Holdings, a software company. Some of the Stoneledge salespeople—representatives of IMK—were housed in the Integrys Holding office, which "made it easy for them to use our email." According to Cox, these sales reps were not IMK owners or employees, but "contractors of IMK." Marick would primarily supervise these sales people, but they were contracted through IMK, working out of the office of the Integrys Holdings shareholders.

Other evidence was presented to establish that Marick and IMK shared responsibility for the management of Stoneledge's sales team.

Rick Thoennes' own testimony further established the joint nature of the Stoneledge enterprise. In attempting to explain how homeowners would report a defect with their unit, Thoennes stated:

It depends on which hat I had on that particular day. I've been—Mr. Lyles said I sold them. Somebody else said I built them, and somebody else said I'm a director on the Board. . . . So I guess it depends on which hat I had. . . . I didn't have the pleasure of being able to say, I'm a director now. At seven o'clock, I'm a contractor. At eight o'clock, I'm a marketing person. I didn't have that luxury.

In the eyes of the HOA members, IMK, Marick, and the individual investor parties serving on the HOA board were one and the same. Stoneledge property owner Robert White testified, "I.M.K., to me, in terms of the faces of the folks that were part of I.M.K. were Rick Thoennes and his son and Tim Roberson." White and his wife communicated with IMK regarding their "quite hefty list of punch list items."

Further, Thoennes, as Marick's principal and license holder³, had at least constructive knowledge of the pervasive construction defects that plagued the project, but was nevertheless directly involved in IMK and Marick's marketing and sale of the units. Given that Marick's and IMK's profits were entirely dependent on IMK's ability to sell the units, their operations were clearly in pursuit of a common business purpose, albeit to the detriment of the HOA members. Accordingly, we find evidence supports the trial court's single business enterprise ruling.

E. ELECTION OF REMEDY

³ Rick Thoennes and his son, Rick III, started Marick home builders together. When Marick Home Builders ceased operations and became insolvent in 2009, Thoennes and his son started a new home building corporation, M Group. Rick Thoennes was the license holder for both Marick Home Builders and M Group.

"Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action." *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996). "It is the act of choosing between inconsistent remedies allowed by law on the same set of facts." *Id.* "Its purpose is to prevent double recovery for a single wrong." *Id.* "Where a plaintiff presents two causes of action because he is uncertain of which he will be able to prove, but seeks a single recovery, he will not be required to elect." *Adams v. Grant*, 292 S.C. 581, 586, 358 S.E.2d 142, 144 (Ct. App. 1986).

Marick asserts the trial court erred in failing to require the HOA to elect a remedy because "[a]ll of the damages awarded to the [HOA] by the jury arise from the same set of facts and are not distinct to different causes of action." The HOA argues "everyone including Marick, [the HOA], and the trial court agree that the damages [the HOA] requested at trial, essentially the cost of repair, was the remedy [the HOA] sought. [The HOA] sought no other remedy Thus there was nothing for [the HOA] to elect."

Immediately after the jury returned its verdict, the HOA asked the trial court if the damages award was meant to be cumulative. The trial court stated, "Well, the way the Defendants have been treating it, yes, it is cumulative" Marick did not object to the trial court's ruling that the damages would be cumulative or ask the trial court to inquire as to the jury's intent behind the multiple awards.

Marick's failure to object to this ruling renders its election of remedies argument unpreserved. The trial court ruled that the damages the jury awarded for each of the causes of action would be added together, and that the HOA was entitled to damages for each of those causes of action. Marick failed to object to the court's decision or request the court ask the jury what its intent was in how it awarded damages. Accordingly, Marick is unable to argue on appeal the court's decision was in error. *See Allegro v. Scully*, 400 S.C. 33, 49 n.9, 733 S.E.2d, 114, 123 n.9 ("If a jury verdict form is ambiguous or unclear, the jury should be returned to the jury room in order to clarify or conform the verdict to its intent before the jury is excused.").

F. SET OFF

Section 15-38-50 of the South Carolina Code (2005) provides that, "[w]hen a release . . . is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) . . . it reduces the claim against the

others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater"

"[W]hen a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law." *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). However, when the settlement involves compensation for an injury different from the one tried to verdict, there is no set off as a matter of law. *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct. App. 1998). When the settlement "is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between" the claims. *Smith*, 397 S.C. at 473, 724 S.E.2d at 191.

At trial, the HOA requested the jury return a verdict for \$6,309,197 for the full amount required to bring the damaged buildings up to the quality at which they were marketed. After deliberations, the jury returned a verdict in favor of the HOA for a total of \$5,000,000-\$3,000,000 on the negligence cause of action against Marick and Bostic, \$1,000,000 on the breach of implied warranty cause of action against Marick and Bostic, and \$1,000,000 for the breach of fiduciary duty cause of action against Thoennes and other directors.

After the jury returned its verdict, the trial court held an additional proceeding to apportion fault among the defendants. The jury apportioned 40% of fault to Marick on the negligence claim and 70% of fault to Marick on the breach of implied warranty claim. The jury was then dismissed.

The trial court held a post-trial hearing on several motions after releasing the jury. Among those motions was a motion for setoff. During the hearing on the motion for setoff, the HOA requested the court reform the jury's verdict to reflect that each cause of action supported the \$5,000,000 cumulative verdict. After several motions for reconsideration, the trial court entered judgment against Marick as follows: (1) for negligence- \$857,635.29; (2) for breach of implied warranty- \$2,144,088.23. The trial court entered judgment against Rick Thoennes for \$2,144,088.23 for breach of fiduciary duty.

Initially, Marick asserts the trial court erred in entering judgment as detailed above because "the damages awarded and the apportionment provided do not correlate with the evidence." Essentially, Marick argues the trial court's final entry of judgment does not correlate with the jury's verdict. We agree.

It appears the trial court amended the jury's verdict to find that each cause of action independently supported a \$5 million verdict. In doing so, the trial court invaded the province of the jury. *See Joiner v. Bevier*, 155 S.C. 340, ___, 152 S.E.2d 652, 657 (1930) ("It is [the judiciary's] duty to enforce a verdict, not to make it."). Therefore, we find the jury's verdict, and its allocation of damages to the three separate causes of action should be reinstated.

The question then becomes how the court should allocate the setoff Marick and Thoennes are entitled to based upon the settlement the HOA received prior to trial. Thoennes' fiduciary duty to the HOA was the result of his position on the Board of the HOA. Based on the record, it does not appear any Board members settled with the HOA prior to trial. Therefore, 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. Accordingly, Thoennes is responsible for the \$1 million award for breach of fiduciary duty, subject to any claims he may have for contribution from any other defendants.

The remaining \$4 million verdict should be set off by the amount of the prior settlements. After deducting the value of the settlements, this would leave a \$2,144,088.23 judgment to allocate between the negligence and breach of implied warranty causes of action. Because the jury awarded \$3 million to the negligence cause of action and \$1 million to the breach of implied warranty cause of action, we believe it would be proper to allocate three-fourths of the remaining judgment to the negligence cause of action and the remaining one-fourth to the breach of implied warranty cause of action. This allocation would mean \$1,608,066.17 would be allocated to the negligence cause of action and \$536,022.06 would be allocated to the breach of implied warranty cause of action.

Applying the apportionment statute and the apportionment amounts the jury determined at trial, Marick would therefore be responsible for \$643,226.47 for the negligence claim and \$536,022.06 for the breach of implied warranty claim, subject to any claims it may have against Bostic for contribution. *See S.C. Code Ann. § 15-38-15* ("In an action to recover damages resulting from . . . damage to property . . . if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages 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.").

CONCLUSION

Accordingly, we affirm in part, reverse in part, and remand for entry of judgment consistent with this opinion.

HUFF and McDONALD, JJ., concur.