

68317

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-07-00790

RECEIVED

MAY 08 2013

SC Court of Appeals

Sandy Lane HPR,.....Plaintiff,

vs.

Harden Fraser Construction, Fraser Construction Co., Inc., Goff D'Antonio Associates, Daufuskie Island Oceanfront, LLC, BPMA, Inc., James Stewart d/b/a Classic Stucco, Pro-Plastering, Inc., Cone Caulking Company, ABG Caulking Contractors, Inc., Sto, Inc., TM Windows & Doors, LLC, B. Cheek Enterprises d/b/a Bonita Stucco, Savannah Architectural Supply, Inc., Ask Us Supply, Inc., d/b/a Savannah Architectural Supply, Security Impact Glass, LLC,.....Defendants,

Handwritten initials

Of Whom, James Stewart d/b/a Classic Stucco is the.....Appellant


and

Fraser Construction Co., Inc. is the.....Respondent.

NOTICE OF APPEAL

James Stewart d/b/a Classic Stucco ("Classic Stucco") notices its appeal of the following judgment and orders: (1) the oral decision of the Honorable Stephanie P. McDonald, announced at trial without any written order, to grant a directed verdict in favor of the Respondent Fraser Construction Company; (2) the judgment entered following a jury verdict in favor of Respondent

Fraser Construction Co., Inc. (filed on August 8, 2012); (3) Judge McDonald's Order on Post-Trial Motions of James Stewart d/b/a Classic Stucco and Fraser Construction Company (filed on January 22, 2013); and (4) Judge McDonald's Order denying James Stewart d/b/a Classic Stucco's Rule 59(e), SCRCF, motion (filed on April 8, 2013). Both parties made timely post-trial motions after the entry of the judgment. Classic Stucco received written notice of the entry of the Order on Post-Trial Motions of James Stewart d/b/a Classic Stucco and Fraser Construction Company on March 6, 2013. Classic Stucco filed a timely Rule 59(e) motion and received written notice of the entry of the order denying that motion on April 10, 2013. Copies of the original judgment and the two orders are attached.



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Attorneys for the Appellant James Stewart
d/b/a Classic Stucco

May 8, 2013

Other Counsel of Record:

Franklin J. Smith, Jr.
Jarred H. Garraux
Richardson Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, SC 29601
(803) 779-0016

Attorneys for the Respondent
Fraser Construction Co., Inc.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-07-CP-00790

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SC Court of Appeals

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Of Whom, James Stewart d/b/a Classic Stucco is the.....Appellant

and

Fraser Construction Co., Inc. is the.....Respondent.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant James Stewart d/b/a Classic Stucco, certifies that I have this **8th day of May, 2013**, served a copy of the **Notice of Appeal** upon counsel of record for the Respondent by causing it to be deposited in the United States mail

with sufficient postage affixed, addressed to: Franklin J. Smith, Jr., and Jarred H. Garraux;
Richardson Plowden & Robinson, P.A.; 1900 Barnwell St., Columbia, SC 29201.

R. Hawthorne Barrett

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Attorneys for the Appellant James Stewart
d/b/a Classic Stucco

May 8, 2013

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
)

COUNTY OF BEAUFORT

)
) Civil Action No.: 10-CP-07-00790
)

Sandy Lane HPR

Plaintiff,

vs.

Harden Fraser Construction, Fraser
Construction Co., LLC, Goff D'Antonio
Associates, Daufuskie Island Oceanfront,
LLC, BPMA, Inc., James Stewart d/b/a Classic
Stucco, Pro-Plastering, Inc., Cone Caulking
Company, ABG Caulking Contractors, Inc.,
Sto, Inc., TM Windows & Doors, LLC, B.
Cheek Enterprises d/b/a Bonita Stucco,
Savannah Architectural Supply, Inc., Ask Us
Supply, Inc., d/b/a Savannah Architectural
Supply, Security Impact Glass, LLC

Defendants.

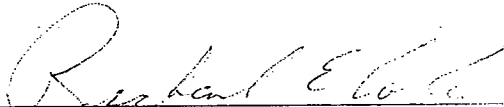
VERDICT FORM

JENNIFER ROSS NEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

12 AUG - 8 AM 9:41

1) We, the jury, unanimously find in favor of the Plaintiff in the amount of:

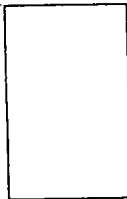
\$ 215,000


Richard Cole, Foreperson

August 7, 2012
Beaufort, South Carolina

WHEN YOU HAVE COMPLETED THE QUESTIONS, PLEASE
NOTIFY THE BAILIFF.





STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT

COUNTY OF BEAUFORT

13 JAN 22 PM 2:01

Sandy Lane HPR

) Civil Action No.: 2010-CP-07-00790

Plaintiff,

vs.

Harden Fraser Construction, Fraser
Construction Co., LLC, Goff D'Antonio
Associates, Daufuskie Island Oceanfront, LLC,
BPMA, Inc., James Stewart d/b/a Classic
Stucco, Pro-Plastering, Inc., Cone Caulking
Company, ABG Caulking Contractors, Inc.,
Sto, Inc., TM Windows & Doors, LLC, B.
Cheek Enterprises d/b/a Bonita Stucco,
Savannah Architectural Supply, Inc., Ask Us
Supply, Inc., d/b/a Savannah Architectural
Supply, Security Impact Glass, LLC

**ORDER ON POST-TRIAL MOTIONS OF
JAMES STEWART D/B/A CLASSIC
STUCCO AND FRASER
CONSTRUCTION CO.**

Defendants.

This case involves a contractual indemnification claim asserted by the general contractor Fraser Construction (hereinafter "Fraser") against a stucco subcontractor, James Stewart d/b/a Classic Stucco (hereinafter "Classic Stucco"), which was tried before a jury in Beaufort County on August 6 and 7, 2012. At the close of the evidence, the Court directed a verdict in favor of Fraser on the contractual indemnification claim. The jury returned a verdict in favor of Fraser in the amount of \$215,000. Following the trial, Classic Stucco filed motions for new trial absolute, new trial nisi remittitur, and JNOV with memoranda in support of the motions. Fraser filed post-trial motions for JNOV and for an award of attorney fees and costs and a memorandum in support of these motions. Classic Stucco submitted a memorandum in return to Fraser's post-trial motions, which was accompanied by the affidavit of their expert Dennis McKevitt.

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2012

A hearing on these motions was held before the Court on November 29, 2012. After reviewing the motions, memoranda, and affidavits submitted by the parties and considering the arguments of counsel, the Court grants in part and denies in part the post-trial motions of Fraser and denies the post-trial motions of Classic Stucco for the reasons set forth below.

I. Factual Background.

This case involves the construction of the Sandy Lane Condominiums located on Daufuskie Island, South Carolina (hereinafter "the Project"). The Project included two buildings which were built three years apart in two separate phases. The general contractor for the Phase I building of the Project was Harden Fraser. The general contractor for the Phase II building was Fraser. Classic Stucco contracted with Fraser for the stucco application of the Phase II building. Classic Stucco was not involved in the Phase I building and had no contract with Harden Fraser.

The Sandy Lane HPR (hereinafter "HPR") filed suit against Fraser, Harden Fraser, and other subcontractors involved in the construction of the Project. Fraser asserted a cross-claim against Classic Stucco for contractual indemnification. The HPR reached a settlement of its claims with Fraser and Classic Stucco. Thereafter, Fraser's contractual indemnification claim against Classic Stucco proceeded to trial before a jury in Beaufort County.

II. Fraser's Motion for JNOV.

"In deciding a motion for JNOV, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party." *Gastineu v. Murphy*, 331 S.C. 565, 568 (1998). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Id.*

Fraser moved for judgment notwithstanding the verdict (JNOV) as to damages, seeking judgment in the amount of \$675,000 plus attorney fees and costs. Fraser's argument in support

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of its motion is that the jury's verdict was unsupported by the evidence in that there was no evidence to allow for apportionment of the \$675,000 settlement amount paid by Fraser in the absence of speculation on the part of the jury. In response to this motion, Classic Stucco argued that a motion for JNOV is not the proper avenue for seeking an increase in the jury's verdict, and the only proper mechanism would be through a motion for new trial *nisi additur*. Further, Classic Stucco argued that based on the evidence presented and instructions by the Court, it was not unreasonable for an allocation of the damages to be made by the jury. Without reaching a determination of whether this is a proper motion by Fraser, the Court finds that the evidence presented adequately supports the jury's verdict. Therefore, Fraser's motion for JNOV is DENIED.

III. Fraser's Motion for Attorney Fees and Costs.

"The determination of the amount and reasonableness of attorneys' fees remains a question of law for the Court." *Dent v. Beazer Materials and Services, Inc.*, 993 F. Supp. 923, 942 (D.S.C. 1995). Fraser contends that it is entitled to an award of attorney fees and costs in the amount of \$292,945.96. Fraser submitted the affidavit of Franklin J. Smith, Jr., Esq. in support of its application for the attorney fees in this lawsuit generated by Richardson Plowden & Robinson, PA on behalf of Fraser and Harden Fraser. Mr. Smith's Affidavit stated that Fraser had incurred attorney fees in this matter in the amount of \$186,820.00, expenses in the amount of \$25,564.32, and expert and investigation costs in the amount of \$80,561.64, for a total of \$292,945.96. The Court finds the attorney fees and costs sought in this matter to be reasonable.

Fraser argued that it was entitled to recover all attorney fees and costs in the matter based on the indemnification provision in the contract between Fraser and Classic Stucco. The indemnification provision in the contract between Fraser and Classic Stucco stated:

The Subcontractor shall indemnify and hold harmless the Contractor against all claims by the Owner or any third party arising from or related in any manner in whole or in part to the work performed by the Subcontractor. The Subcontractor shall defend all suits brought against the Contractor or Owner on account of any such claims and shall reimburse the Contractor for any expenses, including reasonable attorney's fees sustained by the Contractor by reason of such claims.

Classic Stucco disputed that Fraser was entitled to recover any attorney fees and costs as the Court should not accept the affidavit provided in support of the motion for attorney fees and costs due to factual errors and omissions of fact which make the affidavit inadequate for an allocation of attorney fees and cost. The court disagrees.

In the alternative, Classic Stucco argued that that if attorney fees and costs were to be awarded then the affidavit of Classic Stucco's expert Dennis McKeivitt provides the proper apportionment. Classic Stucco contends that any award of attorney fees and costs should exclude attorney fees and costs incurred:

1. In the defense of Harden Fraser as Classic Stucco did not have a contract with Harden Fraser;
2. In the defense of claims on Building B as Classic Stucco did not work on the building and therefore, no claims could arise from or be related in any manner in whole or in part to the work performed by Classic Stucco; and
3. Prior to the receipt of notice to Classic Stucco from Fraser of its demand to defend and indemnify being made on June 21, 2012
4. In defense of claims made on the work of subcontractors other than the work performed by Classic Stucco.

Fraser and Harden Fraser contend that as in the defense provided by an insurance carrier, Classic Stucco is required under its contract to defend the entire lawsuit. As the defense of both Harden

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Fraser and Fraser were performed in one lawsuit, with the same work being necessary for each entity whether defended together or separately, no requirement to delineate or split the fees exists.

The Court agrees with Fraser that the fees associated with the defense of Harden Fraser, and Fraser Construction do not need to be separated or distinguished one from the other.

Classic Stucco further argues that an award of attorney fees and costs should not include those expenses incurred in pursuing the indemnification action against Classic Stucco. The Court agrees. The allowance for the recovery of attorney fees is limited to fees incurred in the defense of the claim indemnified and does not extend to services rendered in establishing the right to indemnity. *Ranger Construction Co. v. Prince William County*, 605 F.2d. 1298, 1301-1302 (4th Cir. 1979).

The Court grants Fraser's motion for attorney fees and costs to the extent of those attorney fees and costs incurred in the defense of Fraser and Harden Fraser in the amount of \$272,945.76 and the Court denies Fraser's motion to the extent of those attorney fees and costs expended in the pursuit of the indemnification claim against Classic Stucco in the amount of \$20,000.00.

IV. Classic Stucco's Motion for New Trial Absolute.

Classic Stucco moved for a new Trial on the basis that the Court erred in granting Plaintiff's motion for a directed verdict on the basis that the indemnification language in the contract was ambiguous and does not provide a clear and unequivocal statement of Fraser Construction's intentions to be indemnified for its own negligence. Classic Stucco also argued the contract was open to more than one interpretation and the ambiguity should be resolved against Fraser as the preparer of the contract.

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In addition, Classic Stucco moved for a new trial on the basis that the Court erred in granting Fraser a directed verdict on the contractual indemnification claim. Classic Stucco argued that the testimony presented by Mr. Joe Fraser created a question of fact as to whether Classic Stucco had fulfilled the terms of its contract with Fraser and that it was necessary for the Court to determine the credibility of Mr. Fraser and assign weight to the various aspects of Mr. Fraser's testimony in order to grant the directed verdict.

The Court disagrees and finds that the directed verdict motion of Fraser was properly granted. Classic Stucco's motion for new trial absolute is denied.

V. Classic Stucco's Motion for New Trial *Nisi Remittitur*.

Classic Stucco moved for a new trial *nisi remittitur* on the basis that the jury's verdict was excessive and should be reduced because the evidence presented at trial does not support the damages awarded by the jury in the amount of \$215,000. Classic Stucco argued that there was evidence to support an allocation of damages based upon the contract language quoted above. Classic Stucco also argued that the damages were speculative and therefore, the verdict should be reduced. The Court finds the damages awarded by the jury were not excessive and denies Classic Stucco's motion for new trial *nisi remittitur*.

VI. Classic Stucco's Motion for JNOV.

Classic Stucco moved for judgment notwithstanding the verdict on the basis that the damages presented at trial were speculative, that the contract had been fulfilled by admission of Fraser, and that the contract was ambiguous. The Court finds that the jury properly considered the evidence in reaching its verdict; and therefore Classic Stucco's motion for JNOV is denied.

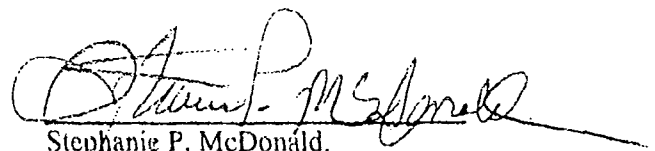
For the reasons set forth above, the Court:

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-6-

1. Grants Fraser's motion for attorney fees and costs in the amount of \$272,945.76, excluding the attorney fees and costs incurred in pursuing its indemnification claim;
2. Denies Fraser's motion for JNOV;
3. Denies Classic Stucco's motion for new trial absolute;
4. Denies Classic Stucco's motion for new trial *nisi remittitur*; and
5. Denies Classic Stucco's motion for JNOV.

IT IS SO ORDERED.

January 14, 2013
Charleston, South Carolina


Stephanie P. McDonald,
Presiding Judge

STATE OF SOUTH CAROLINA
 COUNTY OF BEAUFORT
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-07-0790

Sandy Lane HPR

13 JAN 22 Pm 2:41

Harden Fraser Construction, Fraser Construction Co., LLC, Goff D'Antonio Associates, Dausfuskie Island Oceanfront, LLC, BPMA, Inc., James Stewart d/b/a Classic Stucco, Pro-Plastering, Inc., Cone Caulking Company, ABC Caulking Contractors, Inc., Sto, Inc., TM Windows & Doors, LLC, B. Check Enterprises d/b/a Benita Stucco, Savannah Architectural Supply, Inc., Ask Us Supply, Inc., d/b/a Savannah Architectural Supply, Security Impact Glass, LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT:** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT:** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to the right to restore, confirm, vacate, or modify the arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow); Statement of Judgment by the Court: At a hearing on November 29, 2012, the Court GRANTED Fraser Construction's Motion for Attorney's Fees and Costs in the amount of \$272,945.76, excluding the attorney fees and costs incurred in pursuing its indemnification claim; DENIED Fraser Construction's motion for JNOV; DENIED Classic Stucco's Motion for New Trial Absolute; DENIED Classic Stucco's motion for New Trial Nisi Remittitur; and DENIED Classic Stucco's motion for JNOV.

ORDER INFORMATION

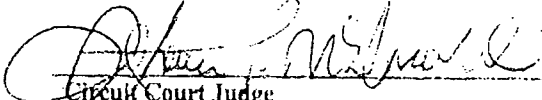
This order ends does not end the case.

Additional Information for the Clerk : Order on Post-Trial Motions of James Stewart D/B/A Classic Stucco and Fraser Construction Company

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2163
Judge Code

1/11/2013
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____, to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____



State of South Carolina
The Circuit Court of the Ninth Judicial Circuit

Stephanie P. McDonald
Judge

Charleston County Judicial Center
100 Broad Street, Suite 427
Charleston, SC 29401
Phone: (843) 958-5102
Fax: (843) 958-5107
smcdonald@cccourts.org

January 14, 2013

Beaufort County Clerk of Court
Attention: Jamie Thompson
P.O. Box 1128
Beaufort, SC 29901-1128

Re: Sandy Lane v. Harden Fraser Construction, et al
2010-CP-07-0790

Dear Jamie,

Enclosed please find the original Form 4 Order and Order on Post-Trial Motions of James Stewart D/B/A Classic Stucco and Fraser Construction Company. Do not hesitate to contact me with any questions or concerns. Thank you.

With kind regards, I am

Sincerely Yours,

A handwritten signature in cursive script that reads "Sarah Woodard".

Sarah E. Woodard
Law Clerk

Enclosure(s)

Sandy Lane HPR

Fraser Construction, et al

2013 APR -8 PM 2:10

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

SERVIANN ROSEHEAD
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

Attorney for : Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Classic Stucco's Motion for Reconsideration is hereby DENIED.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

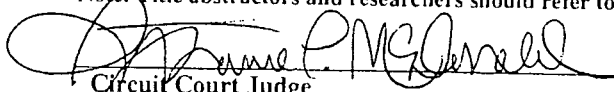
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		\$
		\$
		\$

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 Circuit Court Judge

2163
 Judge Code

04/04/13
 Date

For Clerk of Court Office Use Only

This judgment was entered on 8 April, 2013, and a copy mailed first class or placed in the appropriate attorney's box on 8 April, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Thomas Justin Finn PO Box 6003 Hilton Head Island, SC
2993860

ATTORNEY(S) FOR THE PLAINTIFF(S)

Franklin J. Smith Jr. PO Drawer 7788 Columbia, SC 29202
David J. Mills PO Box 1469 Pawleys Island, SC 29585
Charles J. Baker III PO Box 999 Charleston, SC 29402
Charles Grant Blackburn 1933 York Dr. Columbia, SC
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Robert Michael Ethridge 40 Calhoun St., Ste. 400
Charleston, SC 29401
William Gordon Lyles III PO Box 773 Charleston, SC
29402
John Lucius McCants PO Box 11803 Columbia, SC 29211
David Allen Anderson PO Drawer 7788 Columbia, SC
29202
Jonathan J. Anderson PO Box 87 Charleston, SC 29402

ATTORNEY(S) FOR THE DEFENDANT(S)

Jamie Thompson

Jerri Ann Roseneau - Clerk of Court

Court Reporter-N/A