RECEIVED
Oct 20 2023
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No.: 2021-000658

R-Anell Housing Group, LLC, …………………………………….. Respondent,
v.
Homemax, LLC, ……………………………………………………. Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

THOMAS J. RODE, SC Bar No. 77480
Thurmond Kirchner & Timbes, P.A.
15 Middle Atlantic Wharf
Charleston, South Carolina 29401
Phone: 843-937-8000
Fax: 843-937-4200
Email: thomas@tktlawyers.com

-and-

BRAD D. HEWITT, SC Bar No. 77924
1523 Huger Street, Suite A (29201)
Columbia, SC 29202
803/726-0123 office
Email: bhewett@mklawgroup.com

Attorneys for Petitioner

<u>INDEX</u>

Certification of Counsel …………………………………………………………………..ii

<u>Questions Presented</u> ………………………………………………………………….....1

<u>Introduction</u> …………………………………………………………………………..... 1

<u>Factual Background</u> ……………………………………………………………………2

<u>Procedural History</u> …………………………………………………………………...…6

<u>Argument</u> ....……………………………………………………………………….......... 7

I. Did the Court of Appeals err in finding that the exception to the economic-loss rule established by this Court in *Kennedy,* is only applicable where the claimant is an individual, and cannot apply where the plaintiff is a "commercial entity?"…………………………..7

II. Did the Court of Appeals err in finding the economic loss rule applied here because the parties' expectations were set out by contract where there is no evidence of such a contract, and where those duties also arose independent of any contract, even if such a contract existed? ……………………………………………………………………….…10

III. In affirming the trial court's award of statutory prejudgment interest from March 24, 2018, did the Court of Appeals err in finding that the amount claimed was for a sum-certain simply because the amount was transcribed on an invoice, where the evidence shows there was no agreement on the means of calculating the amount claimed and where Respondent's own representative conceded the amount was not due on March 24, 2018?......................13

IV. Did the Court of Appeals err in finding that Petitioner's argument that Respondent failed to plead statutory prejudgment interest was not preserved where Respondent acknowledged at trial that interest plead in its complaint was not statutory prejudgment interest?..........18

V. Did the Court of Appeals err in finding that an email exchanged between Respondent and its delivery company as irrelevant to issues related to the plastic wrapping Respondent installed on the Christofoli House where the email was exchanged on the day the Christofoli House was delivered and discussed problems with the plastic wrapping on the house it delivered the day before and requested additional tools and materials to be prepared for dealing with potential problems with the plastic wrapping on the Christofoli House……………………………………………………………………………………20

<u>Conclusion</u> ……………………………………………………………………………… 24

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No.: 2021-000658

R-Anell Housing Group, LLC, …………………………………….. Respondent,
v.
Homemax, LLC, ……………………………………………………. Appellant.

Certification of Counsel

Pursuant to South Carolina Appellate Court Rule 224(d)(1) the below signed certifies that a Petition for Rehearing was made and finally ruled upon by the South Carolina Court of Appeals on September 20, 2023.

THURMOND KIRCHNER & TIMBES, P.A.

/s/ Thomas J. Rode

THOMAS J. RODE, Bar No. 77480
15 Middle Atlantic Wharf
Charleston, South Carolina 29401
Phone: 843-937-8000
Fax: 843-937-4200
Email: thomas@tktlawyers.com
Attorney for Petitioner

QUESTIONS PRESENTED

I. Did the Court of Appeals err in finding that the exception to the economic-loss rule established by this Court in *Kennedy,* is only applicable where the claimant is an individual, and cannot apply where the plaintiff is a "commercial entity?"

II. Did the Court of Appeals err in finding the economic loss rule applied here because the parties' expectations were set out by contract where there is no evidence of such a contract, and where those duties also arose independent of any contract, even if such a contract existed?

III. In affirming the trial court's award of statutory prejudgment interest from March 24, 2018, did the Court of Appeals err in finding that the amount claimed was for a sum-certain simply because the amount was transcribed on an invoice, where the evidence shows there was no agreement on the means of calculating the amount claimed, and where R-Anell's own representative conceded the amount was not due on March 24, 2018?

IV. Did the Court of Appeals err in finding that Petitioner's argument that Respondent failed to plead statutory prejudgment interest was not preserved where Respondent acknowledged at trial that interest pled in its complaint was not statutory prejudgment interest?

V. Did the Court of Appeals err in finding that an email exchanged between Respondent and its delivery company as irrelevant to issues related to the plastic wrapping Respondent installed on the Christofoli House where the email was exchanged on the day the Christofoli House was delivered and discussed problems with the plastic wrapping on the house it delivered the day before and requested additional tools and materials to be prepared for dealing with potential problems with the plastic wrapping on the Christofoli House?

INTRODUCTION

The petitioner, Homemax, LLC ("Homemax" or "Appellant") is a modular home dealer in South Carolina. (App. p. 368). The respondent, R-Anell Housing Group, LLC ("R-Anell" or "Respondent") is a foreign entity in the business of manufacturing modular homes for sale in South Carolina. (App. p. 368). This lawsuit concerns two separate modular homes manufactured by R-Anell and sold to Homemax—the "Christofoli House" and the "Brown House." (App. pp. 17-19) (App. pp. 20-27). After paying for the Christofoli House, Homemax discovered it had suffered damage because of water intrusion. Therefore, Homemax withheld payment on the Brown House.

R-Anell sued Homemax for breach of contract seeking payment for the Brown House. (App. p. 18). Homemax counterclaimed for negligence and breach of contract regarding the damages to the Christofoli House. (App. pp. 23-26). At trial, the circuit court directed a verdict on Homemax's claim of negligence, based on the economic loss rule, and the matter went to the jury on R-Anell's claim for breach of contract. After the jury returned a verdict in favor of R-Anell, the trial court awarded R-Anell statutory prejudgment interest. Homemax appealed these rulings together with the trial court's decision to exclude certain email evidence related to plastic wrapping on R-Anell homes as irrelevant.

On August 9, 2023, the Court of Appeals issued Opinion No. 2023-UP-289 affirming the trial court on all three issues. Specifically, the Court of Appeals held the exception to the economic loss rule created in *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989) did not apply because Homemax is a commercial entity (rather an individual) and because R-Anell's duties were established by contract even though there was no evidence of such a contract at trial. The Court of Appeals also affirmed the grant of statutory prejudgment interest even though it was not pled. And finally, the Court of Appeals affirmed the trial court's exclusion of the email evidence. Homemax timely filed a Petition for Rehearing which the Court of Appeals denied on September 20, 2023. This Petition for Writ of Certiorari follows.

FACTUAL BACKGROUND

Although Homemax and R-Anell had a relationship going back to 2014, the parties entered into a written dealership agreement on January 1, 2017. (App. pp. 338-40). However, this agreement did not layout the specific details of how individual transactions were to be conducted. Rather, the evidence presented at trial regarding the parties' course of dealing demonstrated that if a Homemax customer was interested in an R-Anell home, the customer would select their desired

model, options, and trims, then Homemax would request a quote from R-Anell. *See e.g.,* (App. pp. 318-21). If approved, Homemax would submit a purchase order to R-Anell for the specific floor plan model. (App. pp. 322-24). Homemax would pay for the homes through a line of credit that Homemax had with a third-party lender—a process the parties call "floor plan financing." (App. pp. 43-44). After receiving a purchase order R-Anell would confirm the payment source before it would begin manufacturing the home. (App. p. 370). Manufacturing usually began four to six months after R-Anell received the purchase order. (App. p. 101).

The modular homes were manufactured in two halves which would be joined together once delivered to the final homesite. Therefore, to avoid exposure of the interior components to the elements, the final stage of production required R-Anell to wrap the house in a water-tight plastic. (App. p. 68). R-Anell was responsible for delivering the home to its final homesite and would hire contractors to unwrap and erect the two halves of the house on the foundation. (App. p. 61). The floorplan financing source would typically remit payment directly to R-Anell a couple weeks after the house was shipped. (App. p. 111).

The Christofoli House

In December of 2016, Homemax ordered a modular home from R-Anell for Mr. and Mrs. Christofoli. (App. pp. 341-44). Production of the "Christofoli House" was completed before the site preparations were completed at the final homesite. As a result, on May 5, 2017, R-Anell moved the Christofoli House to an outside storage lot where it remained for twelve days. (App. p. 371). It was significant to R-Anell, for budgetary and accounting reasons, that the Christofoli House ship as soon as possible. (App. p. 105). Therefore, even though the Christofoli homesite was not ready, on May 17, 2017, R-Anell shipped the Christofoli House to Homemax's retail location, where it remained (outside) until June 26, 2017, when it was finally delivered to the Christofoli's homesite.

(App. p. 372). Once at the final homesite, contractors hired by R-Anell unwrapped the house to discover one of the modules (Unit A) had suffered significant damage because of water intrusion. R-Anell instructed its contractors to remove all the water damaged components, and initially began efforts to repair the home. (App. p. 148). However, on September 21, 2017, R-Anell informed Homemax that it would not be undertaking any further repair efforts, and that it would be Homemax's responsibility to complete the remediations. (App. p. 348). Homemax ultimately lost the deal with the Christofolis, incurring damages of $203,301.96 caused by the damage to the home. (App. p. 372).[1]

The Brown House

On September 1, 2017, R-Anell submitted a quote for a house to Homemax's customers Mr. and Mrs. Brown. The quoted price was $142,660 but was "subject to verification." (App. p. 318). However, due largely to the ongoing dispute over the problems with the Christofoli House, on February 27, 2018, R-Anell sent a letter notifying Homemax that it was terminating its relationship with Homemax and stating it would not "sell or build any additional retail sold homes for Homemax from the date of [February 23, 2018]." (App. p. 345). At the time R-Anell sent this letter, it had not yet delivered the Brown House. Despite some initial confusion about the status of the Brown House, subsequent to sending this letter, R-Anell clarified it did not intend to abandon the Brown House. (App. p. 114).

As the Brown House neared completion R-Anell's transportation coordinator Melissa Allen took over the transaction to verify payment terms and coordinate delivery. (App. pp. 127-

[1] This included costs of remediating the water damage to the house, paying interest to its floor plan source for the house, paying utilities for the house, paying legal fees to defend litigation ultimately brought against it by the Christofolis, and $94,000.00 paid by Homemax to the Christofolis to settle the lawsuit.

128). R-Anell's internal documents, when provided to Ms. Allen, showed the Brown House transaction was to be "COD" (*i.e.,* "cash on delivery"). (App. pp. 135-37). However, Ms. Allen testified that she knew Homemax had never purchased a home COD, but always utilized a floor plan financier. (App. p. 130). This was confirmed to be the case several days before the Brown House shipped *via* a phone call between Ms. Allen and David Fautley (owner of Homemax) in which Mr. Fautley advised that he had not agreed to COD, but instead that it would floor planned. (App. p. 130). After this call, Ms. Allen confirmed that the purchase was "pending" with one of Homemax's floor plan financiers. (App. p. 131).

Ordinarily, R-Anell would not ship a home until Ms. Allen confirmed that the floor plan financing had been approved. (App. p. 116). In this case when Ms. Allen went to check the floor plan status with the third-party financier, she confused the Brown House with a recent prior purchase from Homemax that had a similar serial number. (App. p. 117). Under the mistaken belief that the floor plan had been approved, R-Anell shipped the Brown House to Homemax. (App. p. 116). Upon delivery, R-Anell neither expected nor requested payment from Homemax. (App. p. 84); (App. p. 122); (App. pp. 130-31); (App. pp. 204-05).

Several months passed before it was discovered that the floor plan financier had not paid for the Brown House. (App. pp. 105-06). Only then did R-Anell seek payment from Homemax on the invoice for the Brown House, except the invoice amount was different from the amount shown on the quote originally submitted for the Brown House. *See* (App. pp. 322-24) (App. pp. 318-21). However, by this time, Homemax had incurred substantial damage and costs stemming from the debacle with the Christofoli House—this exceeding the amount R-Anell demanded for the Brown House. Therefore, Homemax declined pay. This suit followed.

PROCEDURAL HISTORY

R-Anell commenced this action for breach of contract regarding the Brown House. (App. pp. 17-19). Meanwhile, Homemax asserted counterclaims for negligence and breach of contract related to the Christofoli House for damages which eclipsed the amount sought for the Brown House. (App. pp. 20-27). The case was tried before a jury in Lexington County in June of 2021.

At the trial, Homemax attempted to introduce email correspondence between R-Anell and its delivery company dated May 17, 2017—the same day the Christofoli home was delivered—in which the delivery company was complaining the house it carried for R-Anell the day before "had all kinds of problems with [the] plastic" wrapping and requesting more tape to address these issues. (App. pp. 346-47). Notwithstanding that Homemax's claim focused on R-Anell's failure to properly wrap the house, the trial court excluded this evidence on the basis that it was not relevant. (App. pp. 85-87).

At the close of Homemax's case in chief, the trial court directed a verdict against Homemax on its claim for negligence, reasoning this claim was barred by the economic loss rule. (App. pp. 224-56). To support this, the trial court held that R-Anell had no duties beyond those set forth by contract and therefore, the jury was never able to consider Homemax's tort claim. (App. pp. 236-39). The jury returned a verdict for R-Anell on the claims for breach of contract. (App. p. 313). Over Homemax's objection the trial court awarded R-Anell prejudgment interest from March 24, 2018. (App. pp. 314-15); (App. pp. 152-60). Homemax timely appealed. (App. pp. 406-08).

On August 9, 2023, the Court of Appeals issued Opinion No. 2023-UP-289 affirming the trial court. A timely Petition for Rehearing was denied by the Court of Appeals and this Petition for Writ of Certiorari to the Court of Appeals follows.

ARGUMENT

This Petition concerns the Court of Appeals' ruling on three issues: (1) The economic loss rule, (2) prejudgment interest, and (3) the exclusion of relevant evidence.

*

Economic Loss Rule

The trial court found the economic loss rule compelled a directed verdict on Homemax's negligence claim because R-Anell's duties were controlled exclusively by contract. (App. p. 239). Although the Court of Appeals acknowledged that the Supreme Court carved out an exception to the economic loss rule in *Kennedy,* it nonetheless affirmed finding the *Kennedy* exception did not apply for two reasons: because Homemax "is a commercial entity, not an individual;" and second because the expectations of the parties reading the Christofoli House "were set entirely by contract." (App. p. 3).

This Court should grant this Petition for Certiorari to review the Court of Appeals' ruling regarding the economic loss rule because: (I) the Court of Appeals' ruling created a new rule that prohibits application of the *Kennedy* exception where the claimant is a commercial entity as opposed to an individual, and this rule is inconsistent with prior rulings of this Court and public policy; and (II) the Court of Appeals erred in finding that the parties' expectations regarding the Chirstofoli House were controlled exclusively by contract, where there was no contract setting forth those expectations, and where the law has imposed legal duties on the manufacturers of modular homes that arise independent of any contract.

I. Did the Court of Appeals err in finding that the exception to the economic-loss rule established by the Supreme Court in *Kennedy,* is only applicable where the claimant is an individual, and cannot apply where the plaintiff is a "commercial entity?"

Traditionally, the economic loss rule marks the distinction between actions which lie in tort and actions which lie in contract. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan,*

Jones & Goulding, Inc., 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995) (recognizing that "the economic loss rule maintains the dividing line between tort and contract") (internal quotations omitted). Generally, "the economic loss rule simply states that there is no tort liability for a product defect if the damage suffered is only to the product itself." *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989) (stating the traditional application would provide "tort liability only lies where the damage done is to other property or is personal injury").

However, *Kennedy* carved out an exception to the economic loss rule which provides that were the "product" at issue was a residential home, the economic loss rule would not exclude tort liability simply because the damage is limited to the home. *Kennedy,* at 347, 384 S.E.2d at 737-38. Although the title (*i.e*., economic loss rule) might suggest the focus is on the loss, the "framework" adopted in *Kennedy* actually "focuses on activity, not consequence." *Id.* at 345, 384 S.E.2d at 737.

The Court of Appeals concluded that Homemax's "claim does not fall within the [*Kennedy*] exception because it is a commercial entity, not an individual homebuyer." (App. p. 2). However, the law has never made the application of the *Kennedy* exception dependent on whether the claimant was an individual or a commercial entity. The Court of Appeals effectively created a new rule of law—*i.e.,* The *Kennedy* exception only applies where the claimant is an individual.

As a threshold point, the notion that the *Kennedy* exception does not apply to a commercial entity is inconsistent with this Court's ruling in *Kennedy* in the most fundamental way. In creating the relevant exception to the economic loss rule the *Kennedy* Court specifically overruled *Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc.*, 297 S.C. 74, 78, 374 S.E.2d 897, 900 (Ct. App. 1988)—a prior Court of Appeals decision which held there was no tort liability against a builder. This Court's ruling in *Kennedy* would have compelled a different outcome in *Carolina Winds*. *See*

Kennedy, 299 S.C. 335, 341, 384 S.E.2d 730, 734 (stating *Carolina Winds* "reaches a result that is repugnant to [] South Carolina [public] policy"). This is important because the plaintiff in *Carolina Winds* was a business entity—specifically, an "Inc." Thus, if the *Kennedy* Court intended that its ruling should only apply to individuals, there would be no reason to overrule *Carolina Winds.* Consequently, the Court of Appeals' conclusion that *Kennedy* only applies to individual plaintiffs, rather than business entities, is inconsistent with *Kennedy* itself.

The only legal authority cited by the Court of Appeals for its new rule is a parenthetical citation to *dicta* offered about *Kennedy* in *Sapp v. Ford Motor Co.*, 386 S.C. 143, 148, 687 S.E.2d 47, 49 (2009). The issue in *Sapp*—which was decided ten years after *Kennedy*—concerned whether to expand the *Kennedy* exception beyond the context of residential homes. In explaining why the *Kennedy* exception should not be expanded, the *Sapp* Court offered additional insight into the public policy considerations that were served by the *Kennedy* exception. Of these included the observation that a "home is typically an individual's single largest investment and is a completely different type of manufactured good than any other type of product that a consumer will buy" and that often "the transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power." *Sapp*, 386 S.C. at 148, 687 S.E.2d at 49. This is what the Court of Appeals relied on.

However, there are several reasons why *Sapp* does not support the Court of Appeals' decision to narrow the *Kennedy* exception such that it only applies to individual plaintiffs. Not the least of which is that the status of the plaintiff was not the issue in *Sapp*. Instead, *Sapp* confronted the question of whether to expand the *Kennedy* exception beyond the residential home context. The *dicta* was offered as additional public policy considerations—which were not specifically outlined in *Kennedy*—that explained why the *Kennedy* exception should not be **expanded.** These

considerations were not offered for **narrowing** the *Kennedy* exception. *See Id.* at 149, 687 S.E.2d at 50 (overruling a prior case to the "extent it **expands** the narrow exception to the economic loss rule beyond" the context of *Kennedy*) (emphasis added). It does not follow that these considerations warrant **narrowing** the *Kennedy* exception, yet that is exactly what the Court of Appeals' ruling has done. Therefore, this Court should grant this Petition for Writ of Certiorari to resolve whether South Carolina should adopt this new and novel rule that limits the *Kennedy* exception based on whether the plaintiff is an individual or business entity.

II. Did the Court of Appeals err in finding the economic loss rule applied here because the parties' expectations were set out by contract where there is no evidence of such a contract, and where those duties also arose independent of any contract, even if such a contract existed?

The Court of Appeals also held that the *Kennedy* exception does not apply because "the parties' expectations for delivery of the Christofoli House were set entirely by contract." (Opinion No. 2023-UP-289 p. 3) *citing Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989). However, this not only misapprehends the law, it is also unsupported by the evidence.

As it concerns application of the economic loss rule, our Supreme Court has been clear that "[t]he question thus, is not whether the damages are physical or economic. Rather, **the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty plaintiff claims the defendant owed**." *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.,* 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995) (emphasis added). Where the duty arises **exclusively** by virtue of a contract, an action will not typically lie in tort, however, where the duty would arise independent of the contract, this will support an action in tort. *Id.* at 55, 463 S.E.2d at 88. This is true where the duties arise from both contract and some other source. *See Kennedy,* at 347, 384 S.E.2d at 737. (finding if the defendant "violates a contractual duty *only,* then his liability is only contractual.

[But] if he acts in a way as to violate a legal duty, however, his liability is **both** in contract and in tort") (italics supplied by court, bold added).

The Court of Appeals' reasoning is seemingly backwards, suggesting that because Respondent owed certain duties under contract, it therefore could not owe those same duties in tort. This reasoning is inconsistent with the established law of this State which requires the duty arise **solely** by virtue of the contract in order for the economic loss rule to apply. *See id.* at 347, 384 S.E.2d at 737 (stating the economic loss rule is to apply "where the duties are created **solely** by contract")(emphasis added). Thus, if there exists a duty that is either in addition to the contract duties or duplicative of the contract duties, then the economic loss rule is not implicated. *See id*.

The Court of Appeals' conclusion that the duties owed by Respondent are limited to contractual duties is flawed for two reasons. First, it overlooked that there is no contract setting out these duties as it relates to the Christofoli House. The only "contracts" between the parties are the dealer agreement and the original quote. Neither of which address R-Anell's duties regarding the production of the house or its delivery. *See* (App. pp. 318-23) (Respondent's initial quote); *and* (App. pp. 338-40) (the dealer agreement).

Second, and even assuming there was a "contract" as it related to the Christofoli House (which there was not), this Court has misapprehended and overlooked that the duties R-Anell breached also arise independent of any purported contractual duty.

In 1984 the Legislature enacted the South Carolina Modular Building Construction Act (the "Act"). *See* S.C. Code Ann. §§ 23-43-10 *et. seq.* The Act empowers the State Building Code Council to promulgate regulations which it has done at Article 6 of Title 8 of the South Carolina Code of Regulations. *See* S.C. Code Ann. § 23-43-40; S.C. Code Regs. Ann. §§ 8-600 *et. seq.* (Modular Building Construction); *see also* 24 CFR § 3280 (federal regulations applicable to

manufactured home construction and safety standards); 24 CFR § 3281.12 (federal regulations providing certain exceptions for modular homes). By law, no business may sell (whether wholesale or retail) modular building units in South Carolina without being licensed by the Council. S.C. Code Ann. § 23-43-150; *see also* S.C. Code Regs. Ann. § 8-620(1) (setting forth the licensing requirements for a manufacturer of modular buildings).

In addition to the licensure requirements, South Carolina's regulations provide that all manufacturers of modular homes, like R-Anell, are subject to tort liability as contemplated by Section 15-3-630 of the South Carolina Code. *See* S.C. Code Ann. § 15-3-630; S.C. Code of Regs. Ann. § 6-626(1) ("All manufacturers . . . to the extent of their work, shall be subject to the provisions of Section 15-3-630."). Section 15-3-630 contemplates tort actions against architects, engineers, and contractors upon completion of applicable portions of a construction project. Among the types of actions specifically contemplated by this statute are "action[s] to recover damages for economic or monetary loss" as well as actions against "manufacturers of components." S.C. Code Ann. § 15-3-640(4) & (9).

Importantly, R-Anell's own witnesses conceded it was subject to these extra-contractual duties. *See* (App. p. 286, lines 2-8) (Mr. Hathcock conceded, with regard to the Christofoli House, that "this home was subject to the National Manufactured Housing Construction and Safety Standards Act").

In sum, this Court has overlooked that R-Anell was subject to duties which arise outside of, and independent from, any contract. That R-Anell might have also had similar duties under a purported contract—assuming a contract existed—does not change the analysis. As a result, the Court of Appeals erred in finding Appellant's tort claims were barred by the economic loss rule, and this Court should therefore grant this Petition for Writ of Certiorari.

**

Prejudgment Interest

Homemax argued the trial court's award of prejudgment interest from March 24, 2018, was error because statutory prejudgment interest was not pled for in the complaint, and because the amount at issue was neither a sum certain nor was it demandable on March 24, 2018. The Court of Appeals affirmed, finding that the failure to plead statutory prejudgment interest (although indisputable) was not preserved. The Court of Appeals also made the summary conclusion that the amount sought was a sum-certain and was also demandable on March 24, 2018. This Court should grant the instant Petition for Writ of Certiorari to review each of these rulings.

III. In affirming the trial court's award of statutory prejudgment interest from March 24, 2018, did the Court of Appeals err in finding that the amount claimed was for a sum-certain simply because the amount was transcribed on an invoice, where the evidence shows there was no agreement on the means of calculating the amount claimed and where R-Anell's own representative conceded the amount was not due on March 24, 2018?

"In all cases of accounts stated and, in all cases, wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." S.C. Code Ann. § 34-31-20(A). "If pre-judgment interest is pled for in the complaint, it is allowed on obligations to pay money from the time the payment is demandable, either by agreement of the parties or by operation of law, if the sum is certain or capable of being reduced to certainty." *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 375, 585 S.E.2d 292, 299 (2003) (citation and internal quotations omitted).

"[O]ur Supreme Court [has] explicated the sum certain requirement for prejudgment interest" by stating that "prejudgment interest is allowed on a claim of liquidated damages; *i.e.*, the sum is certain or capable of being reduced to certainty based on a mathematical calculation

previously agreed to by the parties." *Dixie Bell,* 376 S.C. at 370, 656 S.E.2d at 769 (*citing Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006)).

Where the claim is one for a sun certain, statutory prejudgment interest may only be applied from the time the payment was due. *See Tilley*, 355 S.C. at 375, 585 S.E.2d at 299 ("If pre-judgment interest is pled" it is permitted only "**from the time the payment is demandable,** either by agreement of the parties or by operation of law.") (emphasis added). A claim for prejudgment interest is properly denied where there is no evidence of any specified time for when the account is due or where there is no evidence the parties "agreed to a contract price" before the plaintiff performed. *See S. Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985) (providing that statutory prejudgment interest requires "(1) that the account is actually stated; and (2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time") (citing *Wakefield v. Spoon*, 100 S.C. 100, 84 S.E. 418 (1915)).

Thus, an award of prejudgment interest requires the claim be both for a sum certain and due at a specific time. Here, the evidence fails on both fronts.

Turning first to whether this claim is for a sum certain, the Court of Appeals improperly equated the fact that R-Anell issued an invoice as dispositive of whether this case was for a sum certain. Contrary to the Court of Appeals' reasoning, simply because a plaintiff has transcribed the amount claimed into an invoice does not mean the claim is for a sum-certain. Otherwise, a litigant could make every case one for a sum-certain simply by transcribing the claimed amount into an invoice.

The test is not whether there is an invoice for the amount claimed, but whether the amount due is capable of being made certain "by mathematical calculation previously agreed to by the

parties." *Id.* The question of whether a claim is for a sum-certain turns on the particulars of what the parties agreed to ***before*** the amount was claimed due. To be a sum-certain, the law demands the amount was "capable of being reduced to certainty based on a mathematical calculation **previously agreed to** by the parties." *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 370, 656 S.E.2d 765, 769 (Ct. App 2007) ((*citing Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006)) (all emphasis added). Where the sum "cannot be determined by a fixed formula" agreed to by the parties ***before*** the invoice is submitted, then it cannot be a sum certain. *Id.* (*citing Lewis v. Congress of Racial Equality*, 275 S.C. 556, 274 S.E.2d 287 (1981)).

While an invoice *could be* evidence that the claim is for a sum-certain, an invoice alone is not determinative. Instead, the question is whether the prior *agreement* of the parties establishes the amount to be for a sum certain or "liquidated" amount. *See Dixie Bell,* 376 S.C. at 370, 656 S.E.2d at 770 (recognizing that a liquidated sum is "an amount contractually stipulated to" while an unliquidated sum "cannot be determined by a fixed formula.") *citing Lewis v. Congress of Racial Equality*, 275 S.C. 556, 274 S.E.2d 287 (1981) and *Beckman Concrete Contractors, Inc. v. United Fire and Cas. Co.*, 360 S.C. 127, 131-132, 600 S.E.2d 76, 78-79 (Ct. App. 2004) (italics added for comparison) (internal modifications omitted).

Here, there was an initial quote/offer proposed by Respondent on September 1, 2017, in the amount of $142,660.80. (App. pp. 318-21). Subsequently, on March 24, 2018, Respondent issued an invoice for a different amount—*i.e.*, $142,292.80—this being the amount it now claims to be the "sum-certain." (App. p. 322). However, for this invoice amount to be considered a sum-certain, the law requires there to be a "fixed formula" that was agreed to by the parties ***before*** March 24, 2018. *See supra.* The Court of Appeals misapprehended or overlooked that there is no evidence of any agreed upon formula for calculating the invoice amount.

Had the Legislature intended to make prejudgment interest dependent upon the plaintiff merely generating an invoice it could have drafted Section 34-31-20 to say as much. But it did not. *Accord e.g., Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.,* 357 S.C. 327, 333-42, 592 S.E.2d 335, 339-43 (Ct. App. 2004) (recognizing that the intent of a statute is to be gleaned from the language employed by the Legislature and applying the principle of *inclusio unius est exclusio alterius*—the inclusion of one is the exclusion of another). Thus, the Court of Appeals erred in concluding that the mere exitance of an invoice rendered this a claim for a sum certain. But there is more.

The Court of Appeals affirmed the trial court's grant of prejudgment interest from March 24, 2018. But the evidence does not support this conclusion that the parties agreed the amount was due or demandable on this day.

Even assuming the amount claimed by Respondent was a sum certain (which it is not), it remains that statutory prejudgment interest only accrues from the time the amount was due. *See Tilley v. Pacesetter Corp.*, 355 S.C. 361, 375, 585 S.E.2d 292, 299 (2003) ("If pre-judgment interest is pled" it is permitted only "**from the time the payment is demandable,** either by agreement of the parties or by operation of law.") (emphasis added). A claim for prejudgment interest is properly denied where there is no evidence of any specified time for when the account is due or where there is no evidence the parties "agreed to a contract price" before the plaintiff performed. *See S. Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985).

Although the March 24, 2018, invoice bears the designation COD (*i.e.,* "cash on delivery"), the undisputed evidence presented at trial was that neither Appellant nor Respondent intended or agreed that the invoice was payable upon delivery. To the contrary, the only testimony presented

at trial by Respondent was that payment was to be made at a later date through the floor-plan financing procedures. *See* (App. p. 84) (In explaining why no money was collected on delivery, Phillip Hathcock, general manager of R-Anell, testified it was because a "floor plan [financier] was supposed to pay for it **not COD**.") (emphasis added); *see also* (App. p. 122) (explaining why funds were not demanded on delivery Albert Gurner testified that Respondent was expecting the house would be paid by a floor plan financier and that as a result "**we weren't looking for a COD check at that point**.") (emphasis added); (App. pp. 130-31) (Melissa Allen testified that she spoke with Mr. Fautley—the owner of Appellant—and both she and Mr. Fautley were of the understanding the Brown House would be financed through a floor plan financier and not COD).

It remains that if Respondent was not expecting or requesting to be paid on March 24, 2018, then the only possible inference to be drawn is that the invoice was not due on this day.

Furthermore, the evidence presented by Respondent is that "it didn't even realize the Brown House hadn't been paid for until months after it shipped." (App. pp. 105-06). Thus, there can be no inference that Respondent demanded payment on March 24, 2018, if it was unaware the floor plan financier had not issued payment until several months later. *See Smith-Hunter Constr. Co. v. Hopson,* 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005) (recognizing that interest is payable from the time payment is demandable) (citing *Babb v. Rothrock*, 310 S.C. 350, 426 S.E.2d 789 (1993)).

Finally, it is noted that the terms of the invoice itself are inconsistent with the conclusion that payment was due on March 24, 2018. For example, the invoice states that payment should be remitted to Respondent at its office in Cherryville, North Carolina. (App. pp. 322-24). This is inconsistent with the sale being COD which Respondent testified would require payment be remitted immediately to the driver on delivery. Moreover, the face of the invoice states "This

invoice is Due Upon Receipt **unless** the customer has special terms." (App. p. 322) (emphasis added). In this case, those special terms were Respondent's and Appellant's understanding that the sale was to be financed through a floorplan financier. *Compare* (App. pp. 327-30) (the invoice for the Christofoli House—which was undisputedly floor plan financed—bears the same designation of "Due Upon Receipt unless [there are] special terms"). These facts serve to further demonstrate that there was no agreement between the parties that payment was due on March 24, 2018. *Contra Tilley*, 355 S.C. at 375, 585 S.E.2d at 299 ("If pre-judgment interest is pled" it is permitted only "**from the time the payment is demandable,** either by agreement of the parties or by operation of law.") (emphasis added).

Thus, the Court of Appeals' decision to affirm the award of prejudgment interest from March 24, 2018, was error, and this Court should grant the instant Petition for Writ of Certiorari.

IV. Did the Court of Appeals err in finding that Petitioner's argument that Respondent failed to plead statutory prejudgment interest was not preserved where Respondent acknowledged at trial that interest pled in its complaint was not statutory prejudgment interest?

It is well-settled that "pre-judgment interest should not be included in the judgment [when] it was not pled in the complaint or prayer." *Dixie Bell*, 376 S.C.at 367, 656 S.E.2d at 768 (*citing Town of Bennettsville v. Bledsoe,* 226 S.C. 214, 219, 84 S.E.2d 554, 556 (1954)); *see also McMillan v. S.C. Dep't of Agric.,* 364 S.C. 60, 74, 611 S.E.2d 323, 330 (Ct. App. 2005) ("Pre-judgment interest must be specifically pled in order to be recovered.") (reversed on other grounds by *McMillan v. S.C. Dep't of Agric.*, 380 S.C. 212, 214, 670 S.E.2d 368, 369 (2008)).

In this case, there is no dispute that R-Anell failed to plead prejudgment interest. However, the Court of Appeals determined this argument was not preserved. However, this conclusion is a misapplication of the rules of issue preservation because R-Anell acknowledged that the interest it pled in its complaint was not statutory interest.

Section 34-31-20(A) establishes the statutory prejudgment interest rate at 8.75%. It cannot be disputed that Respondent did not seek statutory prejudgment interest in its complaint. Instead, it sought contractual interest at the rate of 7%. *See* (App. p. 18).

During the trial—at the close of Respondent's case—Appellant moved for directed verdict on Respondent's claim of interest. At which point Respondent first acknowledged that statutory interest must be pled, and then conceded the 7% interest set out in the complaint was: "actually, **that is not the statutory prejudgment interest**." (App. p. 156, lines 24-25) (emphasis added). Appellant likewise pointed out there was neither evidence of a right for interest nor "a claim for a right to interest against [Appellant]." (App. p. 156, lines 11-12). Therefore, when the topic of interest arose again after the verdict was rendered, there was no need for Respondent's counsel to raise the issue again. The trial court was already aware of the fact that the claimed 7% was not statutory interest. Thus, Appellant simply renewed his "object[ion] to the application of any interest"—either statutory or contractual. (App. p. 316) ("There was no agreement in contract or in writing for the recovery of interest. I don't think that there is any statute within the UCC that expressly allows for the recovery of interest in this situation.").

Respondent's acknowledgment that the 7% interest it sought was not statutory interest, is tantamount to a waiver of such relief. *See Dixie Bell*, 376 S.C. at 367, 656 S.E.2d at 768 (discussing the error of granting prejudgment when it is not pled because the party "waived any claim to receive prejudgment interest by not pleading it") (*citing Goodson v. Carolina Container Corp., Inc.,* 283 S.C. 575, 324 S.E.2d 67 (1984)). In the face of this, the trial court was aware that Respondent did not claim statutory prejudgment interest but was clearly resolved to award it regardless. Thus, at the close of all evidence, Appellant's renewed "object[ion] to the application of any interest" was sufficient under the rules of issue preservation which neither require magic

language nor charge a litigant with pestering the trial court. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("[A] party is not required to use the exact name of a legal doctrine in order to preserve the issue."); *see also Evans v. Wabash Life Ins. Co.*, 247 S.C. 464, 466, 148 S.E.2d 153, 153 (1966) (the renewal of a motion for directed verdict at the close of all evidence is sufficient to preserve the issues); *accord Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (a general objection is sufficient to preserve an issue where the context demonstrates the trial court had sufficient information to understand the issue and rule on it.).

To require a litigant to restate a point already admitted by the opposing party—like here—is an overly technical misapplication of the rules of issue preservation. *See generally, Long v. Norris & Assocs. Ltd.*, 342 S.C. 561, 578, 538 S.E.2d 5, 14 (Ct. App. 2000) ("So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon counsel to harass the judge by parading the issue before him again.").

***

Exclusion of Relevant Evidence

V. Did the Court of Appeals err in finding that an email exchanged between Respondent and its delivery company was irrelevant to issues related to the plastic wrapping Respondent installed on the Christofoli House where the email, sent the day the Christofoli House was delivered, discussed recent problems with plastic wrapping on houses manufactured by Respondent?

At trial, Homemax sought to introduce a thread of four emails exchanged between R-Anell and the delivery company that delivered the Christofoli House. The reference line of this email reads "40876" which is the serial number for the Christofoli House. (App. p. 346); *see* (App. p. 344) (showing the serial number for the Christofoli House); (App. p. 80, lines 5-6) (R-Anell acknowledging the same). This email exchange discusses the overloading of the Christofoli House and the extraordinary efforts the delivery company went through to make sure it could meet Respondent's delivery schedule. (App. p. 346). The thread begins with a complaint that one of the

Christofoli modules, particularly "THE A side is loaded down with parts [and] the driver said this house weight [sic] too big and heavy to be delivering parts" and asks if it is possible to move some parts to the other unit. (App. p. 347). The second half of the email thread recounts an effort on the part of the driver, who would be delivering the Christofoli House, to get additional rolls of tape to use for the purpose of repairing problems with the plastic wrapping during transit. (App. p. 346). The reason the driver needed these additional roles of tape was because he had used all his tape the day before. The email explains; "yesterday they had all kinds of problems with [the] plastic" wrapping on the house they delivered." (App. p. 346). In response, R-Anell thanks the delivery company for fixing the problems with the plastic wrap the day before and recognizes that "Unfortunately [trouble with the plastic] happens from time to time" and confirming the driver was provided two rolls of tape for the Christofoli delivery. (App. p. 346).

Generally, "all relevant evidence is admissible." *State v. Pagan*, 364 SC 201, 210, 631 S.E.2d 262, 266 (2003) *citing* Rule 402, SCRE and *State v. Saltz*, 346 S.C. 114, 551 S.E.2d 240 (2001). Relevancy is generally accepted to be a low bar. Relevant evidence is defined as "evidence having **any** tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE (emphasis added). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." *State v. Sweat*, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App. 2004). Evidence need only be "logically relevant" and not a necessary element of the case. *Id.*

The trial court excluded this thread of emails holding "it is not relevant to the ultimate issue in this case." (App. p. 87, lines 4-5). The Court of Appeals affirmed finding "[t]he emails did not

address issues with the Christofoli House or Brown House, and the unspecified problems the delivery company's drivers had with the plastic wrapping, which do not appear to have resulted in damage to the house delivered, are not relevant to the issues with the plastic wrapping on the Christofoli House." (App p. 3).

The Court of Appeals, like the trial court, focused on the singular idea that the problems the delivery company had with the plastic wrap "yesterday" did not relate to the Christofoli House. (App. pp. 3-4). In essence, the Court held that evidence of problems with the plastic wrap on one house were not relevant to whether there were problems on the Christofoli House. However, this is an overly narrow analysis of relevance and misapprehends the evidence presented at trial.

R-Anell has conceded that to protect its homes from water damage it has a duty to properly wrap the homes before they are shipped. (App. p. 71) (suggesting this duty arose independent of contract). Moreover, when it comes to the wrapping, R-Anell testified that the Christofoli House was wrapped the same as all the other houses it manufactured and shipped. (App. p. 65) (Phillip Hathcock testified that the Christofoli House was "wrapped . . . just like [] all the other ones that we sent out there."); (App. p. 74). (Phillip Hathcock conceded "again, I mean, we wrap them all the same way."); (App. p. 68). (R-Anell conceded it had a duty and obligation to "properly wrap" the houses).

Because R-Anell has equated the propriety of the wrapping on the Christofoli House with the quality of its wrapping on all other houses, it cannot reasonably be said that the quality of the wrapping on the house delivered the day before is not logically or rationally connected to the quality of the wrap on the Christofoli house. *See generally, Toole v. Salter*, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967) ("[i]n determining a dispute concerning the relevancy of . . . evidence, the

question to be resolved is as to whether there is a logical or rational connection between the fact which is sought to be presented and a matter of fact which has been made an issue in the case.”).

By testifying that its wrapping on the Christofoli House was of the same quality as all other houses, R-Anell made the quality of the wrapping on other houses—including the one delivered the day before—relevant, and the email in question speaks directly to this point. The email offers direct evidence that “trouble with the plastic [wrapping]” is not uncommon, but rather something that “[u]unfortunately happens from time to time.” (App. pp. 346-47). Further, this email which is dated the same day the Christofoli House was shipped provides circumstantial evidence that R-Anell was on notice that homes shipped during this time frame were experiencing problems with the plastic wrapping and it took no additional action to ensure the Christofoli House was not experiencing the same or similar problems. (App. at *id.*).

Similarly, R-Anell testified that the wrapping for the Christofoli House is affixed to the house with mechanical fasteners not tape. (App. p. 70). Yet, despite having knowledge of “trouble with the plastic [wrap]” from the day previous, this email correspondence demonstrates that R-Anell provided tape, rather than mechanical fasteners, to the transportation team to address these problems. (App. pp. 346-47). This, despite R-Anell knowing the Christofoli House would be sitting outside for an extended period because the homesite was not ready. (App. pp. 74-75). This serves as, yet another, logical connection rendering the email relevant to the instant case. Ultimately, this is all relevant information that could have aided the jury. Particularly in the face of Respondent’s contrary assertion that it had never had a problem with its wrapping before. *Contra* (App. p. 79) (Philip Hathcock, testifying for Respondent that “We never had a complaint [about the wrapping] until this email.”).

Accordingly, the Court of Appeals erred in concluding that this email had nothing to do with the house in question. Thus, this Court should grant this Petition for Writ of Certiorari to review that decision.

CONCLUSION

For the above-stated reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

/s/ Thomas J. Rode
THOMAS J. RODE, SC Bar No. 77480
15 Middle Atlantic Wharf
Charleston, South Carolina 29401
Phone: 843-937-8000
Fax: 843-937-4200
Email: thomas@tktlawyers.com

-and-

/s/ Brad D. Hewitt
BRAD D. HEWITT, SC Bar No. 77924
1523 Huger Street, Suite A (29201)
Columbia, SC 29202
803/726-0123 office
bhewett@mklawgroup.com

Attorneys for Petitioner