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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Supreme Court Appellate Case No. 2023-001645
Ct. App. Appellate Case No. 2021-000658
Civil Action No. 2018-CP-32-03103

R-Anell Housing Group, LLC .....Respondent,

v.

Homemax, LLC .....Petitioner.

RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Pursuant to Rule 242(f), S.C.A.C.R., Respondent R-Anell Housing Group, LLC ("R-Anell") respectfully submits this Return in opposition to the Petition for Writ of Certiorari.

INTRODUCTION

Five considerations determine whether this Court should grant *certiorari* pursuant to Rule 242, S.C.A.C.R. None of these considerations are explicitly addressed by Petitioner Homemax LLC ("Homemax") in its Petition for Writ of Cetiorari, likely because its Petition does not actually meet any of those criteria. This omission is itself sufficient grounds to deny Homemax's Petition. Further, Homemax fails to demonstrate any error in the opinion by the Court of Appeals affirming the trial court on all grounds raised in Homemax's appeal. Most of the Petition is simply copied from the briefs Homemax filed with the Court of Appeals. Homemax merely seeks a "do-over" of its appeal, in order to re-litigate fact issues decided by the jury and to disagree with the law of this State as set forth by this Court. The Petition should be denied.

COUNTER-STATEMENT OF THE CASE

R-Anell filed a single-count complaint alleging breach of contract and seeking actual damages, as well as interest thereon, against Homemax on September 10, 2018. (*See generally* Appendix pp. 17-19, hereafter ("Appx.")). R-Anell completed a modular home, at the request of Homemax. (Appx. pp. 17-18, ¶¶ 5-7). Homemax accepted delivery of the home (the "Brown Home"), but it refused to pay R-Anell. (Appx. pp. 17-18, ¶¶ 8-10). Homemax answered September 28, 2018, denying liability for the Brown Home contract and countersuing for negligence, unjust enrichment, and breach of contract as to another home (the "Christofoli Home") built by R-Anell for Homemax. (*See generally* Appx. pp. 20-27). Trial commenced on these claims and counterclaims June 7, 2021. (*See* Appx. p. 406).

In relevant part to this appeal, at the conclusion of R-Anell's case-in-chief, Homemax

moved for directed verdict on R-Anell's request for an award of statutory pre-judgment interest pursuant to S.C. Code Ann. § 34-31-20(A). (Appx. pp. 152-157). The trial court denied this motion. (Appx. p. 157). At the conclusion of Homemax's case-in-chief, in relevant part, R-Anell moved for a directed verdict against Homemax's counterclaim for negligence. (Appx. pp. 224-239). The trial court granted R-Anell's directed verdict motion as to Homemax's negligence claim. (*Id.*). The jury returned a verdict in favor of R-Anell's breach of contract claim in the amount of $142.292.80. (*See* Appx. p. 349). R-Anell then moved the trial court to apply the statutory pre-judgment interest rate of 8.75% to the jury's verdict on the breach of contract claim, accruing from March 24, 2018 to the date of judgment. (Appx. p. 314, line 24-p. 317, line 3). The trial court granted this motion. (Appx. pp. 316-317); (*see also* Appx. pp. 8-10).

Homemax filed its Notice of Appeal on June 22, 2021. (Appx. pp. 406-407). Eventually, the record on appeal and all final briefs were filed on May 24, 2022. (*See, e.g.*, Appx. p. 410). On June 1, 2023 (made public on August 9, 2023), the Court of Appeals issued an unpublished *per curiam* opinion affirming the judgment and verdict at trial as to all issues raised on appeal. (Appx. pp. 1-4). Homemax filed its Petition for Rehearing on August 24, 2023, and that Petition was denied by Order of the Court of Appeals on September 20, 2023. (Appx. 498-512); (Appx. pp. 515-516). Homemax thereafter filed its Petition on October 20, 2023, asking that a writ of *certiorari* be issued and that the Supreme Court consider the issues on appeal. (*See generally*, Petition for Writ of Cetiorari (hereinafter, "Pet.")).

Homemax, in its 'Factual Background' section in its original Brief, and again in its Petition, made a number of factual misstatements that were unsupported by the record at trial. (*See* Appx. pp. 416-420); (*see also* Pet., pp. 2-6). These factual matters were disputed at trial and resolved unambiguously in R-Anell's favor by the jury as fact-finder. (*See* Appx. p. 349). In

upholding the trial court on all appealed grounds, the Court of Appeals fully affirmed those findings. That Homemax wishes the outcome at trial had been different does not give them the right to re-argue these established facts in this Court. R-Anell responded as to each and every one of those fact errors in its Response Brief on Appeal, (*See* Appx. 446-451). R-Anell will not do so again here, because those purported facts do not change what should be the result: that the Petition should be denied as to all issues raised.

ARGUMENT

I. Homemax's Petition fails to demonstrate that special and important reasons justify the issuance of a writ of *certiorari*.

Homemax fails to supply any compelling reason for this Court to issue *certiorari* and review the decision of the Court of Appeals. Homemax must show that its Petition raises a "special and important" reason for review by this Court, yet it does not address Rule 242, S.C.A.C.R. at all in its Petition. This is likely because Homemax's Petition does not and cannot raise any novel question of law, there were no dissenting opinions in the Court of Appeal's *per curiam* opinion affirming the trial court, there are no conflicts between the Court of Appeals decision and any prior decision of this Court, there are no substantial constitutional issues implicated by this matter, and there is no federal question implicated by the decision of the Court of Appeals. *See* Rule 242(b), S.C.A.C.R.

Rather than attempting to offer an argument as to why its Petition raises a compelling reason for review by this Court, Homemax instead largely restates its briefs to the Court of Appeals. (*See generally* Appx. 410-438; 473-496). Homemax has no right to a "do-over." *State v. Lyles*, 381 S.C. 442, 443–44, 673 S.E.2d 811, 812 (2009) (holding that *certiorari* and review by the Supreme Court are not a matter of right and are only justified when there are "special and important reasons" for review). The Petition fails to identify any error at all by the Court of

Appeals. Accordingly, the Petition should be denied.

II. The Court of Appeals correctly affirmed the grant of a directed verdict on Homemax's negligence counterclaim because the expectations between the parties were set by contract, and the residential homebuyer exception to the economic loss rule is not applicable here.

The Court of Appeals correctly held that "the trial court did not err in granting R-Anell's motion for directed verdict because the economic loss rule barred Homemax's negligence [counter]claim." *See R-Anell Housing Group, LLC v. Homemax, LLC*, No. 2021-000658, Op. No. 2023-UP-289 (S.C. Ct. App. Aug. 9, 2023) (Appx. p. 3). The Court of Appeals further explained that the economic loss rule applies because "the expectations of the parties for the delivery of the Christofoli House were set entirely by contract" and because the residential homebuyer exception was not intended to apply to contracts between commercial entities. (Appx. p. 3).

In Section I of its Petition, Homemax argues that the decision by the Court of Appeals has the effect of creating a "new rule of law" and narrowing the residential homebuyer exception to the economic loss rule set forth in *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989) (*See generally* Pet., pp. 7-10). Homemax's only argument in support of this contention is that, in creating the residential homebuyer exception in *Kennedy*, this Court voiced its disapproval of the result of *Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S.E.2d 897 (Ct. App. 1988). Homemax argues that since the plaintiff in Carolina Winds was a commercial entity, it necessarily follows (according to Homemax) that the Court of Appeals was wrong in holding in this matter that the residential homebuyer exception does not apply.

This argument by Homemax cannot survive even the first paragraph of the *Carolina Winds* decision. The distinction between Carolina Winds and Homemax is clear – Carolina

Winds was a horizontal property regime's homeowners' association and "represent[ed] the owners of the building," which was an individually-owned condominium building. *Id.* at 75, 898. Carolina Winds sued the builder, on behalf of the individual condominium owners, in negligence and warranty because the owners and the Carolina Winds association lacked privity of contract with the defendant builder. *Id.* at 75-76, 898-899. Homemax is a commercial entity, which was a party to a commercial contract with R-Anell to construct the modular home in question. It represents only its own commercial interests. Thus, to the extent Homemax compares the facts of this case to those of *Carolina Winds*, the two are easily distinguishable. That *Carolina Winds* may have had a different result in light of *Kennedy* does not supply a reason to grant *certiorari*.

This Court explained its reasoning for creating the *Kennedy* exception to the economic loss rule in *Sapp v. Ford Motor Co.*, 386 S.C. 143, 148, 687 S.E.2d 47, 49 (2009). Homemax attempts to explain away this Court's reasoning and explanation for the *Kennedy* exception as dicta. (*See* Pet., pp. 9-10). These statements are not dicta. Rather, these statements – that this Court created the *Kennedy* exception in order to protect homebuyers because "a home is typically an individual's single largest investment" and because "the sale of a home largely involves inherently unequal bargaining power between the parties" – explain **why** this Court felt it necessary to create a "**very narrow**" exception to the economic loss rule. *Sapp*, 386 S.C. at 148, 687 at 49 (emphasis supplied). Homemax satisfies neither of these rationales, so it instead tries to explain them away as unimportant. The very narrow Kennedy exception does not apply to Homemax's negligence counterclaim, and so the economic loss rule bars Homemax's counterclaim.

In Section II, Homemax argues that the Court of Appeals "misapprehends the law" and reaches a conclusion "unsupported by the evidence" in applying the economic loss rule to

Homemax's negligence counterclaim because "the parties' expectations for delivery of the Christfoli House were set entirely by contract." (*See* Pet., pp. 10-12). Homemax thereafter string cites state and federal laws and regulations that it claims impose "duties" on R-Anell. (*Id.*).

Homemax does not attempt to explain even one of those purported extra-contractual duties or the manner in which R-Anell allegedly failed to meet them, nor did it make any such attempt at trial. (*See* Pet., pp. 10-12). There is no appellate authority "under South Carolina law to allow an alleged violation of either statutory law or a regulatory standard to serve as an exception to the economic loss rule." *Besley v. FCA US LLC*, 2016 U.S. Dist. LEXIS 2200, at *14 (D.S.C. Jan. 8, 2016). Federal courts interpreting South Carolina law have routinely held that a failure to specifically articulate extra-contractual duties is fatal to an attempt to state a tort claim where a commercial contract exists between the parties.[1] *See, e.g., Belfor USA Grp., Inc. v. Banks*, 2016 U.S. Dist. LEXIS 91483, at *19 (D.S.C. July 14, 2016) (holding "vague references to 'common building practices' and broad statements of work not being up to 'code' are insufficient to state a tort claim); *Cox House Moving, Inc. v. Ford Motor Co.*, 2006 U.S. Dist. LEXIS 55490, at *22 (D.S.C. Aug. 8, 2006) (finding "[n]o South Carolina court has found that the violation of an industry standard can give rise to a special duty"). The fact that the only damages claimed by Homemax were consequential contractual damages further bolsters the argument that the only damages Homemax sought, or even could have sought, flow entirely from the contract between R-Anell and Homemax. (Appx. p. 23, ¶ 32).

III. The Court of Appeals correctly upheld the trial court's application of statutory pre-judgment interest to the principal amount of the judgment, because the contract was for a sum certain that was demandable as of March 24, 2018.

[1] In *Sapp*, this Court "conclude[d] the federal courts were correct" in the many instances where the federal courts limited the applicability of the *Kennedy* exception under South Carolina law. *Sapp*, 386 S.C. at 149, 687 S.E.2d at 50.

The Court of Appeals correctly held that "the trial court did not abuse its discretion in awarding statutory prejudgment interest to R-Anell, because the amount sought was for a sum certain and the amount claimed was demandable on March 24, 2018." *See R-Anell Housing Group, LLC v. Homemax, LLC*, No. 2021-000658, Op. No. 2023-UP-289 (S.C. Ct. App. Aug. 9, 2023) (Appx. p. 2). In Section III of its Petition, Homemax argues there is no evidence to support the trial court's conclusion that R-Anell sought a sum certain for $142,292.80 on March 24, 2018. (*See* Pet., pp. 13-18). This is simply untrue.

Though Homemax at trial and on brief tried to undermine the March 24, 2018 invoice for $141,292.80 that says it is "due on receipt," the jury and trial judge found this invoice to be credible evidence of a contract. (*See, e.g.*, Appx. p. 316, line 19-p. 317, line 2). The Court of Appeals correctly found that the trial judge did not abuse her discretion in finding that the March 24, 2018 invoice, which the jury necessarily found to be the contract between R-Anell and Homemax for the Christofoli home, was the final expression of the parties' contract on the Brown Home and was for a sum certain demandable as of March 24, 2018. *See R-Anell Housing Group, LLC v. Homemax, LLC*, No. 2021-000658, Op. No. 2023-UP-289 (S.C. Ct. App. Aug. 9, 2023) (Appx. p. 2); (*See* Appx. 322-324). The law of South Carolina supports this conclusion. "The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006).

The March 24, 2018 invoice controls the terms of agreement because terms in a confirmatory memorandum are the final expression of the terms between the parties, and those terms, between merchants, become part of the contract unless one of the exceptions in the

operative UCC provision (which Homemax simply ignores) applies. S.C. Code Ann. § 36-2-202; S.C. Code Ann. § 36-2-207(1)-(2). Homemax's complaint that there was no "fixed formula" for calculation of the price misses the mark, since there was no need for a "fixed formula." No fixed formula was needed because the contract sum was a sum certain. *See Butler*, 369 S.C. at 133, 631 S.E.2d at 258-59 ("[P]rejudgment 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"). As the jury found by awarding R-Anell $142,292.80 in principal on its contract claim, the March 24, 2018 invoice demonstrated the final expression of a sum certain contract price. *See* S.C. Code Ann. § 36-2-202; *see* S.C. Code Ann. § 36-2-207 (*See* Appx. p. 349); (*see also* Appx. pp. 322-324).

Similarly, Homemax's argument as to when the payment was demandable collapses when compared to the operative provisions of the South Carolina version of the UCC. The UCC default rule is that when goods are shipped, payment is due at the time and place of delivery. S.C. Code Ann. § 36-2-310(a). Given that the goods here were both shipped and delivered on March 24, 2018, the default statutory due date of payment is March 24, 2018. (*See* Appx. pp. 322-324). This is when payment is demandable "by operation of law." *See Future Grp. v. Nationsbank*, 324 S.C. 89, 101, 478 S.E.2d 45, 51 (1996), overruled on other grounds, *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774, (2021), reh'g denied (Aug. 18, 2021) (citing *Babb v. Rothrock*, 310 S.C. 350, 426 S.E.2d 789 (1993)). In addition, the parties "by agreement" established payment was due on March 24, 2018 by the uncontradicted terms of the March 24, 2018 invoice which is "Due Upon Receipt." (*See* Appx. 322-324); *see also Future Grp.*, 324 S.C. at 101, 478 S.E.2d at 51. Homemax simply disagrees with the interpretation of the evidence by the jury and the trial court related to the invoice. This is not a basis for review in

this Court.

In Section IV, Homemax argues that R-Anell failed to adequately plead the prejudgment interest statute, and that the Court of Appeals erred in finding that Homemax failed to preserve the issue at trial for appeal. (Pet., pp. 18-19). Homemax is again wrong in both respects. As this Court has previously held, "pre-judgment interest must be pled in order to be recovered, **except in cases involving an agreement to pay a sum certain**…" *Calhoun v. Calhoun*, 339 S.C. 96, 102, 529 S.E.2d 14, 18 (2000) (emphasis added). Because prejudgment interest need only be specifically "pled absent an agreement to pay a sum certain," and the jury and trial court found the March 24, 2018 invoice constituted a sum certain expression of a contract, there was no actual need by R-Anell to plead prejudgment interest in order to recover it. *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 367, 656 S.E.2d 765, 768 (Ct. App. 2007) (citing *Calhoun v. Calhoun*, 339 S.C. 96, 102, 529 S.E.2d 14, 18 (2000)). In any event, R-Anell did request prejudgment interest in its Complaint. (*See* Appx. pp. 18-19, ¶ 16 and Wherefore Clause) ("Plaintiff is entitled to an award for actual damages, with interest thereon, for Defendant's breach of contract.")).

Homemax claims R-Anell conceded through counsel at trial that it did not plead statutory prejudgment interest. (*See* Pet., p. 19). For this proposition, Homemax takes out of context an edited portion of a single sentence (which is a response to a question from the trial court, edited down to change the effect of the sentence) out of a multiple-page discussion within the transcript regarding prejudgment interest. (*See generally* Appx. pp. 156-158); (*See particularly* Appx. p. 156, line 16-p. 157, line 14). In fact, the result of this discussion at trial, at the time Homemax moved for a directed verdict, was that the trial court determined the issue of 7% interest was a fact issue for the jury, but whether R-Anell was entitled to 8.75% prejudgment interest was a question of law to be determined at the end of trial. (*See* Appx. p. 157, lines 13-14)

("So that is a matter for the Court and not a matter for the jury to decide anyways."). There was no discussion of the pleadings at all, and certainly no waiver of the application of pre-judgment interest whatsoever. Rather, the trial court, who was well-situated to determine whether any waiver occurred, reserved ruling on the matter on statutory pre-judgment interest until the end of trial. (*Id.*). The trial court ruling on the matter at the end of trial is inconsistent with Homemax's contention that the right to prejudgment interest was waived. (*See* Appx. p. 157, line 13-14).

Further, as the Court of Appeals held, this argument by Homemax is "not preserved for appellate review because Homemax did not raise this argument to the trial court." *See R-Anell Housing Group, LLC v. Homemax, LLC*, No. 2021-000658, Op. No. 2023-UP-289 (S.C. Ct. App. Aug. 9, 2023) (Appx. p. 2). Homemax relies entirely on its baseless argument that R-Anell waived its right to claim prejudgment interest to support its claim that it did preserve the issue at trial. To preserve an issue for appeal, "the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Homemax had at least two opportunities to address the statutory prejudgment interest argument at trial: Once during Homemax's directed verdict argument, and the other at the conclusion of trial. (Appx. p. 152, line 16-p. 157, line 25; Appx. p. 314, line 24-p. 317, line 3). By failing to make those arguments at trial, Homemax failed to preserve the issue for appeal.

IV. The Court of Appeals correctly upheld the trial court's decision to exclude an email chain offered as evidence because it was irrelevant to the ultimate issues at trial.

The Court of Appeals correctly held that the trial court did not abuse its discretion in refusing to admit emails that "did not address issues with the Christofoli House or Brown House, and…are not relevant to the issues with the plastic wrapping on the Christofoli House." *See R-Anell Housing Group, LLC v. Homemax, LLC*, No. 2021-000658, Op. No. 2023-UP-289 (S.C.

Ct. App. Aug. 9, 2023) (Appx. p. 4).

Homemax argues that the trial court was wrong in not admitting the email chain into evidence, and the Court of Appeals was similarly wrong in not reversing the trial court. (*See* Pet., pp. 21-23). Homemax again fails to meet its steep burden to show a serious evidentiary issue worthy of reversal on appeal. "The [trial] court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 448, 772 S.E.2d 544, 551 (Ct. App. 2015) (quoting *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct.App.2000). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Id.* at 448, 551 (quoting *Menne v. Keowee Key Prop. Owners' Ass'n, Inc.*, 368 S.C. 557, 568, 629 S.E.2d 690, 696 (Ct. App. 2006). The trial court's "ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013) (citing *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)).

Homemax does not show manifest abuse of discretion or injustice, and it merely seems to disagree with the trial court's conclusion that the email chain was not relevant. Homemax does not point to any particular law that demonstrates the exclusion of the email chain was an error of law or a factual conclusion that was devoid of evidentiary support. (*See generally* Homemax Pet., pp. 20-24). Furthermore, Homemax does not articulate in its Petition any probable prejudice arising from the exclusion of the irrelevant email chain, which is required in order to seek reversal of a trial court's ruling on an evidentiary issue. *See State v. Kromah*, 401 S.C. at 349, 737 S.E.2d at 494-95. Homemax's Petition falls far short of demonstrating an abuse of discretion by the trial court or error by the Court of Appeals sufficient to justify review by this Court.

CONCLUSION

For the reasons stated herein, Homemax fails to raise any special and important reasons that would justify the issuance of a writ of *certiorari* and review of this matter in the Supreme Court, and its Petition for Writ of *Certiorari* should be denied.

November 17, 2023.

Respectfully submitted,

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