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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM UNION COUNTY  
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

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Appellate Case No. 2023-000572

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Fast Formliners Company ..... Appellant / Respondent,

vs.

Construction Resource Group, Inc. .... Respondent / Appellant,

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**FINAL OPENING BRIEF OF RESPONDENT / APPELLANT  
IN FURTHERANCE OF THE CROSS-APPEAL**

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**STATEMENT OF THE ISSUES ON APPEAL**

- I. Whether the trial court committed reversible error in denying CRG's motion for a new trial because of a juror's failure to disclose a material relationship with CRG during voir dire.
- II. Whether the trial court abused its discretion in failing to grant CRG's motion for a new trial to account for the undisputed evidence of CRG's costs to cover.
- III. Whether the trial court committed reversible error in admitting video evidence of CRG's production facility, because CRG prohibits video recording on its premises, and the video was taken without CRG's authorization, in violation of applicable statutory law.

## STATEMENT OF THE CASE

After a three-day trial conducted in August 2022, the jury returned a verdict in favor of Appellant / Respondent Fast Formliners Company (“**Formliners**”) against Respondent / Appellant Construction Resource Group, Inc. (“**CRG**”) in the amount of \$112,792.60 on a breach of contract claim. (R. 1.) CRG timely filed a motion pursuant to Rule 59, seeking a new trial on three grounds: (1) that a person who was seated on the jury failed to disclose a material relationship during voir dire, despite being asked a specific question by the trial court that should have required the juror to divulge the existence of the relationship; (2) that the trial court should have reduced the amount of the verdict in light of the undisputed testimony regarding CRG’s costs to cover; and (3) that the trial court engaged in prejudicial error by admitting a piece of evidence that should have been excluded as a matter of law. (R. 67.) The trial court denied CRG’s motion for a new trial on each basis, and this appeal followed. (R. 3.)

## STATEMENT OF FACTS

In 2019, Formliners brought suit against CRG on a breach of contract action, in which it was alleged that Formliners supplied CRG with certain construction materials that CRG failed to make payment for. (R. 9.) CRG denied the allegations, contending that the materials Formliners' supplied were non-conforming to project specifications; CRG also filed a counterclaim seeking its own damages in connection with Formliners' putative breach. (R. 26.)

The matter proceeded to trial before a jury in August 2022. During the course of trial, two matters were presented that presently form the basis of this appeal. First, Formliners sought to introduce evidence that consisted of an audio and visual recording of CRG's production facility. (R. 45 & 51.) It was undisputed that a representative of Formliners took the audio/visual recording, and that he did so without CRG's authorization, which was necessary, since CRG's production facility had multiple posted notices plainly stating that any recording without CRG's permission was prohibited. This recording, CRG contended, was unlawful under its stated policies, as well as certain South Carolina statutory authority. Accordingly, prior to trial, CRG filed a motion in limine to prohibit the introduction of this prohibited evidence. (R. 45 & 51.) The trial court granted CRG's motion in limine to the extent of its audio recording, but denied the motion to the extent of its visual recording. (R. 129:9-134:6.) Consequently, during trial, and over CRG's continuing objections, the visual aspect of Formliners' unlawful recording was admitted into evidence and presented to the jury. (See, e.g., R. 153:23-154:18.)

The second matter that occurred during trial and presently forms the basis of this appeal arises in connection with the evidence of damages. Despite the fact that, through

its pleadings, CRG had asserted a counterclaim for its own contract damages against Formliners, CRG did not pursue its claim for affirmative recovery at trial. Instead, CRG presented evidence of the monetary loss it incurred as a result of the breach attributable to Formliners, to demonstrate the amount of setoff that CRG should have been entitled to, in the event a verdict were returned for Formliners. (See, e.g., R. 190:15-18 & 202:12-25.) Ultimately, a verdict was returned in Formliners' favor, and the jury ostensibly gave no consideration to the costs to cover that CRG had incurred. Accordingly, through post-trial motions, the trial court was requested to reduce the amount of the jury's verdict in Formliners' favor to conform to the evidence of CRG's own losses. (R. 67.) That motion was denied. (R. 3.)

The final matter which forms the basis of this appeal was not discovered until after the conclusion of trial. In the week that followed the jury's verdict, CRG learned that a person who was seated on the jury had a personal connection with CRG. (See R. 67, 70 & 92.) This relationship was not disclosed during voir dire, despite the fact that the trial court asked specifically whether any person had any connection with CRG. (R. 122:6-128:14.) The failure of this juror to disclose her relationship with CRG is inexplicable. Accordingly, CRG requested a new trial on the basis of this juror's non-disclosure, (R. 67), though that motion was denied, (R. 3).

Through this appeal, CRG respectfully requests that the Court grant CRG the new trial to which it is entitled, or otherwise modifies the verdict to conform to the evidence regarding the true measure of damages.

## ARGUMENT

Through this appeal, CRG seeks a new trial, or, in the alternative, an alteration or amendment of the judgment. In South Carolina, judges may grant a new trial under the thirteenth juror doctrine, “so named because it entitled the trial judge to sit, in essence, as the thirteenth juror when he finds ‘the evidence does not justify the verdict,’ and then to grant a new trial based solely ‘upon the facts.’” Norton v. Norfolk S. Ry. Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002) (citations omitted). The disposition of a motion for a new trial rests within the discretion of the trial court, and the decision will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Id., 350 S.C. 473, 567 S.E.2d 851. However, when a motion for a new trial is made on the basis that a juror failed to honestly respond to the voir dire conducted by the trial court, the appropriate standard of review is abuse of discretion. See, e.g., Long v. Norris & Assocs., Ltd., 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000). When a motion for a new trial nisi remittitur is made, the trial court should consider whether the monetary relief awarded by the jury exceeds the proper amount of damages sustained, and if so, exercise its discretion soundly in choosing whether and to what extent to modify an award. See, e.g., Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993). When a motion for a new trial is made on the basis that the trial court admitted evidence it should not have, or excluded evidence that it should have admitted, both error and prejudice must be established, such that there is a reasonable probability that the jury’s verdict was impermissibly influenced by the wrongfully admitted or excluded evidence. See, e.g., Conner v. City of Forest Acres, 363 S.C. 460, 611 S.E.2d 905 (2002).

**I. CRG IS ENTITLED TO A NEW TRIAL BECAUSE A JUROR FAILED TO DISCLOSE A MATERIAL RELATIONSHIP DURING VOIR DIRE.**

During voir dire, the trial court explicitly asked whether any prospective juror had any relationship with CRG. (R. 122:6-128:14.) In response to this invitation for disclosure, a prospective juror reported that he has previously worked for CRG. (R. 122:15-123:17.) That juror was dismissed for cause. Voir dire continued, and no other prospective juror reported having any connection to CRG.

After trial, CRG learned this was false. In furtherance of its motion for a new trial, CRG submitted the affidavit of Jimmy Belue, who is a quality control manager with CRG. (R. 92.) Mr. Belue affirmed that, on August 25, 2022—which was barely one week after the conclusion of trial—Mr. Belue’s wife had a conversation with a woman who is her “best friend at work.” The wife’s best work friend reported that she was a juror in Formliners’ trial against CRG, and that CRG had lost.

It is inexplicable how a juror, in a small county such as Union, could not know that her best friend’s husband is a manager with a company who is a defendant in a significant civil action for which she may be seated as a juror.

It is the law of this State that when a juror, without justification, fails to disclose a relationship during voir dire to a question that was directly asked, it may be inferred, in the absence of any mitigating information, that the juror is not impartial. See, e.g., State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982). “Only where a juror’s intentional nondisclosure does not involve a material issue, or where the nondisclosure is unintentional, should the trial court inquire into prejudice.” State v. Woods, 345 S.C. 583, 589, 550 S.E.2d 282, 284 (2001) (quoting with approval Doyle v. Kennedy Heating Serv., 33 S.W.3d 199, 201 (Mo. Ct. App. 2000)). Otherwise, prejudice is presumed.

Had this juror's connection been made known, perhaps the trial court would have taken the same action as it did with respect to the prospective juror who reported a connection with CRG—dismissal from the pool. Perhaps CRG would have used one of its peremptory strikes. Regardless, because of the juror's concealment of material information, both CRG and the trial court were deprived of the opportunity to make an informed decision concerning whether to seat or strike. And, since prejudice arising from this concealment is presumed, it was an abuse of discretion for the trial court to not grant CRG's motion for a new trial.

**II. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL NISI REMITTITUR TO ACCOUNT FOR CRG'S COSTS TO COVER.**

In the underlying case, Formliners alleged that it was a materials supplier to CRG on a significant construction project, and that CRG failed to make payment in full for materials supplied. CRG countered this assertion, contending that the materials procured from Formliners was nonconforming to project specifications, that CRG was forced to terminate its relationship with Formliners, and that CRG incurred a significant amount of expense to cover the costs of Formliners' noncompliance. (R. 181:8-182:5, 183:25-186:7, 190:15-18, 191:11-14 & 207:6-7.) In fact, the undisputed testimony at trial was that the total amount of CRG's costs to cover was \$214,000.00. (R. 190:15-18.)

The jury returned a verdict in favor of Formliners against CRG in the amount of \$112,792.60, which was the total amount of unpaid invoices Formliners presented at trial. However, in light of the undisputed fact that CRG incurred \$214,000 of expense in order to cover for the cost of Formliners' nonconforming performance, it was an abuse of discretion for the trial court to deny CRG's motion for a new trial nisi remittitur, and to reduce—if not wholly eliminate—the award rendered in Formliners' favor to conform to

the evidence of what the proper measure of damages was, giving due regard to the unjust effect on CRG.

For these reasons, the trial court's decision to refrain from granting a new trial nisi remittitur must be reversed, and the case remanded for further proceedings.

**III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING VIDEO EVIDENCE OF CRG'S PRODUCTION FACILITY, BECAUSE CRG PROHIBITS VIDEO RECORDING ON ITS PREMISES, AND THE VIDEO WAS TAKEN WITHOUT CRG'S AUTHORIZATION.**

Before trial, CRG filed two motions in limine regarding certain evidence that Formliners planned to introduce at trial, which consisted of audio and visual recordings of CRG's production facility. (R. 51 & 57.) In those motions, CRG explained that audio and video recordings are expressly prohibited on CRG's premises, and that there are signs posted to that effect. Regardless, in a visit to CRG's facility, one of Formliners' representatives apparently recorded a significant amount of audio/visual information, without authorization, and in clear derogation of CRG's stated policies. The trial court excluded the audio portion of such evidence, but allowed the video portion to be presented to the jury. (R. 129:12-134:8 & 153:23-154:18.)

Despite the limitations imposed on the admissibility of this evidence, it was still an abuse of discretion to allow even just the video component to be presented to the jury. Formliners obtained this evidence, without authorization, and in violation of South Carolina Code § 17-30-65, which provides that "no part of the contents of the communications and no evidence derived therefrom may be received in evidence at any trial, hearing, or other proceeding in or before any court." S.C. Code § 17-30-65(A). Formliners' original video contained audio recording; the audio component of the recording was obtained in violation of law. Therefore, consistent with the foregoing

statutory section, “no part” of that recording was competent for use in evidence at trial—not the video component, and not the audio component. Under the plain language of the statute, neither was admissible.

Because the trial court admitted evidence that, by law, had to have been excluded, the court abused its discretion in failing to grant CRG’s motion for a new trial. Accordingly, this Court is respectfully requested to reverse the trial court’s decision and remand for further proceedings.

**CONCLUDING STATEMENT**

Consistent with the foregoing discussion, and for any other reason that may appear in the record presented, CRG respectfully requests a decision from this Court which reverses the trial court’s decision to refrain from granting CRG a new trial or an appropriate modification of the verdict, remands the case for further proceedings, and provides for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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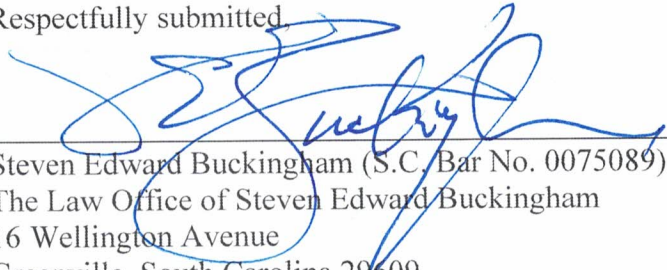
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**CERTIFICATION OF CONFORMITY**

The undersigned counsel for Respondent / Appellant hereby certifies that the Final Brief to which this Certification is attached complies with Rule 211(b), SCACR.

Respectfully submitted,

  
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