

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A Early III, Circuit Court Judge

Case No 2006-CP-40-7215

RECEIVED

MAR 30 2012

S.C. Supreme Court

Fariborz Z Babae and Malihe Babae,

Respondents,

v

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and Preferred Home
Inspections, Inc , Defendants

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is

Petitioner

APPENDIX - VOLUME III

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Thomas William McGee, III
A Mattison Bogan
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, III Circuit Court Judge

Case No. 06 CP 40 7215

Imanborz Z. Babae and Malihe Babae

Appellants/Respondents

vs.

Moisture Warranty Corporation d/b/a Moisture Free Warranty and
Pictured Home Inspections, Inc.
Defendants

Of Whom Moisture Warranty Corporation d/b/a Moisture Free Warranty is
Respondent/Appellant

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Fred Z Babae
133 Beaver Dam Rd
Columbia S C 29223
Ph 803-786-8646x1011
Cell 803-608-2743

Wednesday January 11 2006

Re certification number 411014

Dear Moisture Warranty Corporation

Here is the information you have request

Enclose is the color copy of the moisture report

Also enclose is Mr Clark's information and certification If you need to
contact Mr Clark his phone number is 803-781-4991 or you can reach me at
803-608-2743

Please note moisture meters used for this investigation was Non Intrusive
Meter and Intrusive Meter

Please review these documents and let me know the results ASAP

Our account certification number is 411014

Sincerely


Fred Z Babae

0979

MOISTURE FREE020

APP_0995

Franklin D. Clark

Qualifications

Licensed Builder

Licensed Home Inspector

By South Carolina Department of Labor Licensing and Regulation

South Carolina Residential Builders Commission Board Member

By Governor Mark Sanford 2005

Licensed PCO

By Clemson University Regulatory and Public Service

Qualified FHS Expert

By South Carolina State Courts

Certified Graduate Remodelers

By Remodelers Council (National Homebuilders Association)

Certified Lead Paint Inspector

Certified Graduate Builder

Certified Aging In Place Specialist

By National Homebuilders Association

Experience

Thirty Five Years Building Experience

FHS Task Force for National Homebuilders Association

Memberships

National Homebuilders Association - Life Director

Homebuilders Association of Greater Columbia on Board of Directors

Remodelers Council (HBA of Greater Columbia)

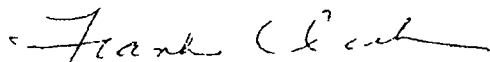
We recommend the following areas be addressed:

- A Page 2 - F 9 G 9 H 9 G 5 G 2 Make a test cut because of medium substrate.
- B Page 3 - All areas where substrate is noted as medium and soft. Make a test cut.
- C Page 5 - Test cut areas where substrate is noted medium and soft.
- D Page 6 - D 9 where substrate is soft. This is under a window.
- E Page 7 - Medium and soft substrate.
- F Page 8 - Substrate soft and 24.6 intrusive moisture reading.
- G Page 9 - All medium and soft substrate areas.
- H Page 10 - Areas with intrusive moisture readings above 19% and medium and soft substrate areas.
- I Page 11 - A 7 A 6 and F 4.
- J Page 12 - H 11 and H 8.
- K Page 13 - H 4 and I 4.
- L Page 15 - C 9 C 6 F 9 and soft substrate areas.

It is generally accepted that wood is removed from kiln-dried 19% moisture content. Any intrusive moisture readings with 10% or more readings indicate a need for repair. A test cut should be done by a skilled applicator or repair person before removing chalking in those areas.

Thank you for offering CK Services, Inc. the opportunity to perform this inspection for you. If you have any questions regarding this inspection, please call us at (803) 781-4991. We would be happy to discuss them with you.

Respectfully submitted,

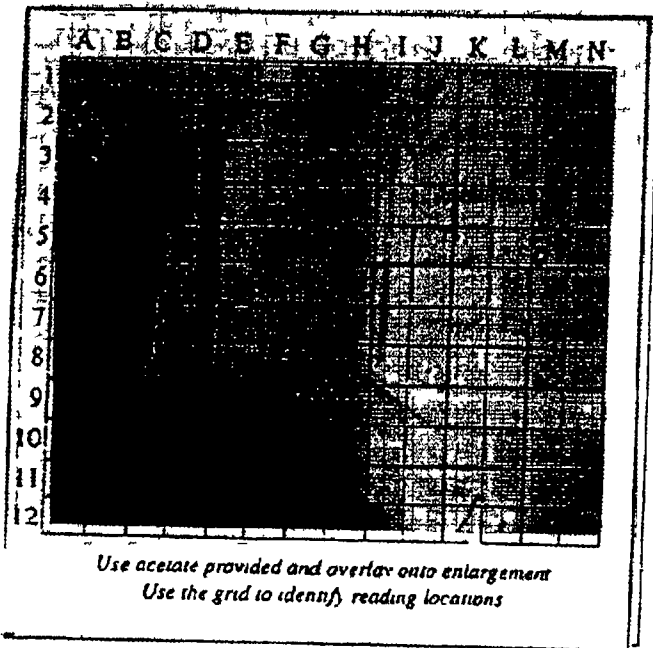


Frank Clark
CK Services, Inc.
Home Inspector License #000159

On Site EIFS Moisture Evaluation Form

Homeowner BADDER

Date 11-02-11
Page 2 of 11



North South East West Elevation
(role one)

Grid	Invasive Reading	Shelling Base Condition	Finishing Base Condition	Obs. Cond.	Observation Detail Note
13	113	H (M) S	H M S		
14	113	H (M) S	H M S		
15	113	H (M) S	H M S		
16	110	H (M) S	H M S		
17	113	H (M) S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		

BP	Beam Penetration	F	Finishing	NK	No Kickout	CH	Crack/Chisel
BS	Base Scribe	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Detail	CH	Gap/Hole	PI	Pest Infestation	MV	Moisture Vapor
DL	Delamination	MV	Moisture Vapor	SC	Surface Cracking	WD	Window Detail

Partial moisture evaluation completed for selected areas of the EIFS cladding. The data reflect condition at the time of inspection. No further analysis or remediation is required.

0982

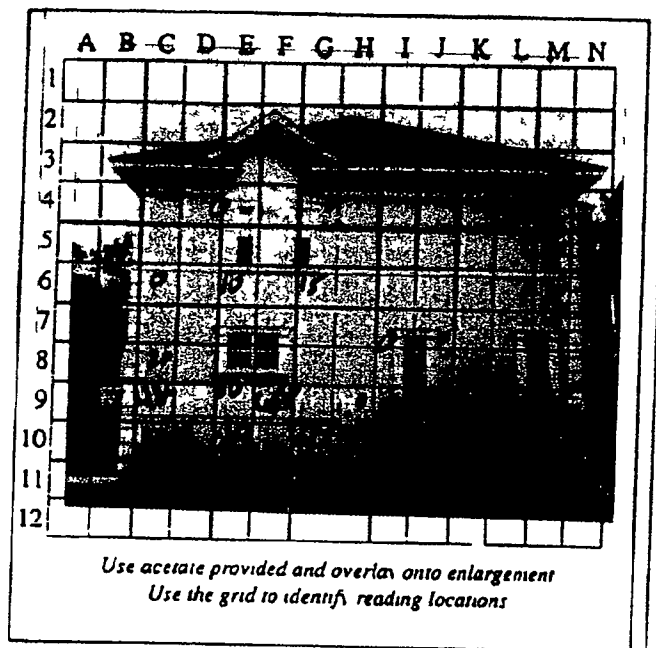
MOISTURE FREE023

APP_0998

On Site EIFS Moisture Evaluation Form

Homeowner BADAE

Date 1/6/02
Page 3



North South East West Elevation
(circle one)

Grid No	Intrusive Reading	Breathin Base Condition	Framing Base Condition	Observation Code	Observation/General Notes
C1	13.3	H (M) S	H (M) S		
E10	10.1	H (M) S	H (M) S		
G10	13.7	H (M) S	H (M) S		
I10	10.8	H (M) S	H (M) S		
I15	11.9	H (M) S	H (M) S		
J10	7.9	H (M) S	H (M) S		
K10	8.2	H (M) S	H (M) S		
M10	12.7	H (M) S	H (M) S		
L10	1.5	H (M) S	H (M) S	SC	
F4	9.1	H (M) S	H (M) S		
		H (M) S	H (M) S		
		H (M) S	H (M) S		

BP	Beam Penetration	FI	Flashing Issue	NK	No Kickout	FS	Failed Sealant
BS	Back Slope	FS	Failed Sealant	VS	No Sealant	GH	Gap/Hole
DD	Door Deformation	GH	Gap/Hole	PI	Pest Infestation	VV	Mesh Visible
DL	Delamination	VV	Mesh Visible	SC	Surface Cracking	WD	Window Detachment

A partial moisture survey has been completed for selected areas of the EIFS cladding. The data reflect conditions at the time of the survey and are not conclusive indicators of future performance.

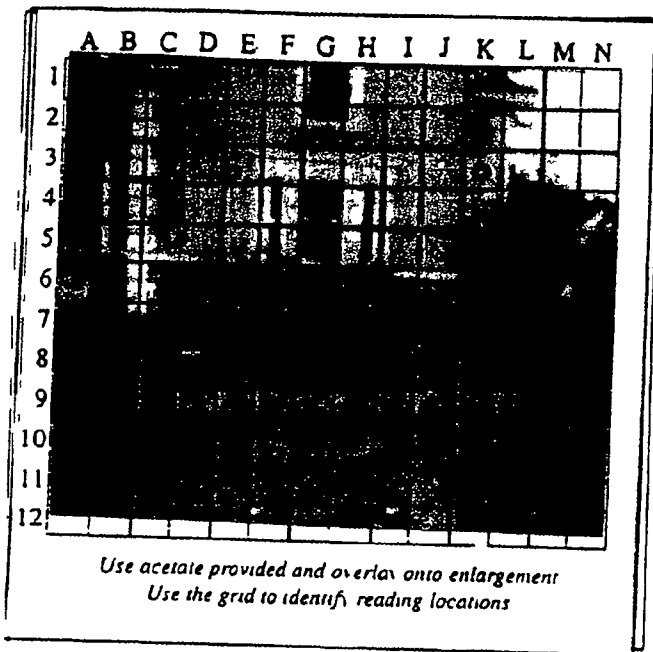
0983

MOISTURE FREE024

On Site EIFS Moisture Evaluation Form

Homeowner BBB & E

Date 11-04-04
Page 4 of 4



North South East West Elevation
(Circle one)

Grid Location	Shedding Base Condition	Finishing Base Condition	Observation Code	Observation Code and Notes
	H V S	H V S		
	H M S	H M S		
	H V S	H M S		
	H M S	H M S		
	H M S	H M S		
	H M S	H M S		
	H M S	H V S		
	H V S	H V S		
	H M S	H M S		
	H M S	H V S		
	H V S	H M S		
	H V S	H V S		

B	Blow	F	Failed Sealant	NK	No Crack	CS	Crack Sealant
BD	Door Damaged	FS	Failed Sealant	NS	No Sealant	CH	Cap/Hole
DD	Door Damaged	GH	Gap/Hole	PI	Post-Installation	MV	Mesh Visible
DL	Delamination	MV	Mesh Visible	SC	Surface Crack	WD	Water Damage

1. This form is to be used to document the condition of the EIFS cladding. The data reflect condition at time of inspection. 2. The data reflect condition at time of inspection. 3. The data reflect condition at time of inspection.

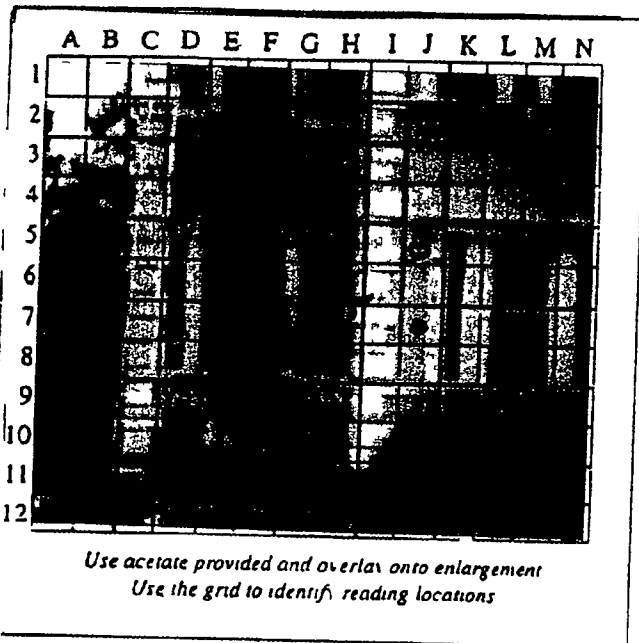
0984

MOISTURE ERF0025

On Site EIFS Moisture Evaluation Form

Homeowner BADPEE

Date 10/2/04
Page 5 of 6

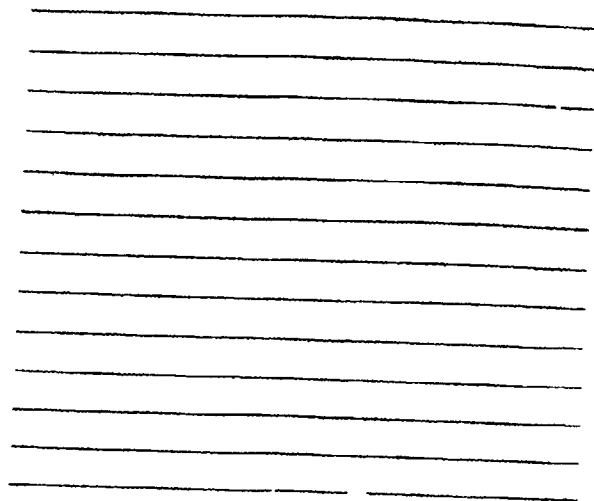


North South East West Elevation
(circle one)

Grid No.	Intest. Reading	Shedding Bl. Condition	Framing Bas. Condition	Dist. Location Code	Observation Code
2-1	95	(H) V S	H V S		
2-1	82	(H) V S	H V S		
3	85	H (M) S	H V S		
12	98	H M (S)	H V S		
14	98	H (M) S	H V S		
9	85	H (M) S	H V S		
16	87	(H) V S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		

B	Blister	F	Failed	SK	No K Sealant	FS	Failed Sealant
BS	Blister Sealant	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DO	Door Damage	GH	Gap/Hole	PI	Post Installation	MI	Mesh Missing
DD	Delamination	MV	Mesh Voids	SC	Surface Cracking	WD	Wash Damage

EIFS must be sampled or selected for the EIFS cladding. The data reflect condition of the EIFS at the time of the inspection. Do not include data for areas not inspected.

[illegible]

are not on the same level as the other areas of the EIFS cladding. The data reflect and indicate a time of re-

On Site EIFS Moisture Evaluation Form

Homeowner BABAE

Date 10/02/04
Page 7 of 15



North South East West Elevation
(circle one)

Reading	Infrared Reading	Snail/Bite Corrosion	Flashing Base Condition	Obs. Cond.	Closest or General Loc.
D9	114	- V S	H I S		
E9	113	H M S	H M S		
D7	110	- M S	H M S		
7	99	H M S	H M S		
E9	112	H M S	H V S		
S9	116	H M S	H M S		
E5	88	H M S	H V S		
E5	88	H M S	H V S		
		H M S	H M S		
		- M S	H V S		
		H M S	H M S		
		- V S	H V S		

3	3	3	3	3	3	3	3
3	3	3	3	3	3	3	3
3	3	3	3	3	3	3	3
3	3	3	3	3	3	3	3

For a moisture survey to be completed, the EIFS cladding must be in a condition that allows for the use of the EIFS cladding. The data reflects the condition of the EIFS cladding.

0987

MOISTURE FREE028

On Site EIFS Moisture Evaluation Form

Homeowner BALDRE

Date 6/2/04

Page 2 of 2



North South East West Elevation
(circle one)

Grid	Reading	Snatching Base Condition	Flashing Base Condition	Other	Notes
7	214	(S) IS	HVS		
7	4	HMS	HVS		
7	8	HMS	HVS		
		HMS	HVS		
		HMS	HVS		
		HMS	HVS		
		HMS	HVS		
		HMS	HVS		
		HMS	HVS		
		HMS	HVS		
		HMS	HVS		
		HMS	HVS		
		HMS	HVS		
		HMS	HVS		
		HMS	HVS		

B	B	B	B	B	B	B	B
B	B	B	B	B	B	B	B
B	B	B	B	B	B	B	B
B	B	B	B	B	B	B	B

EIFS moisture readings are not to be used for structural analysis of the EIFS cladding. The data is for informational purposes only.

On Site EIFS Moisture Evaluation Form

Homeowner BABAK

Date 4/22/04
Page 2 of 3



North South East West Elevation
(circle one)

Reading	Invasive Reading	Sheath Base Condition	Framing Base Condition	Observations	Other Notes
11	98	H (M) S	H V S		
11	101	H M S	H V S		
11	86	(H) M S	H V S		
11	113	(H) M S	H V S		
11	113	H V S	H V S		
16	113	(H) M S	H V S		
4	113	H (M) S	H V S		
		H V S	H V S		
		H M S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		

Bump Pre	0	Fri 2	NS	No Moist	CH	Cap mole
Bump Supp	0	Fri 2	NS	No Moist	CH	Cap mole
Door De	0	G p/Hol	P	Pest infestation	WV	Wash Vible
Det mnd	0	Mesh V s b	SC	Surface Coating	WD	Wash De or

Readings were taken at the locations indicated on the grid. The data reflect conditions at the time of the evaluation.

0989

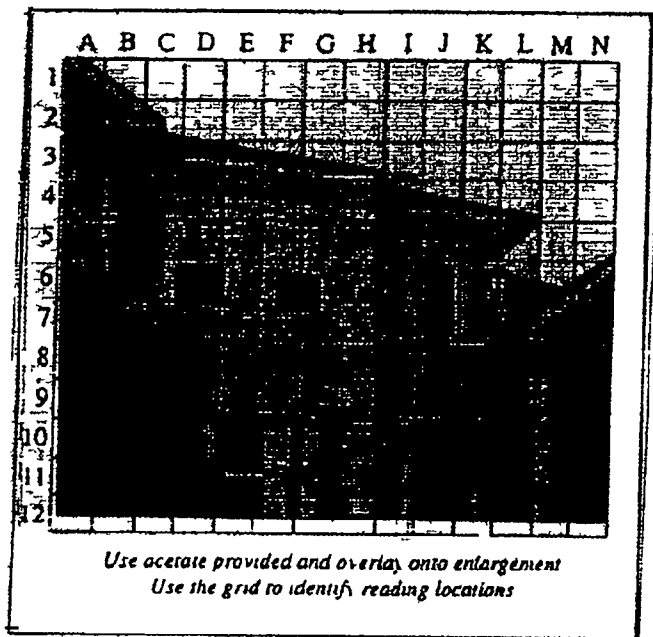
MOISTURE FREE030

APP_1005

On Site EIFS Moisture Evaluation Form

Homeowner RobbEE

Date 4/22/04
Page 10 of 15



North South East West Elevation
Circle one:

Grid No.	Insulation Reading	Base Condition	Finishing Bas Condition	Obs. Color Code	Observation Circle
10	99	F V S	H V S		
11	400	H V (S)	H V S		
12	257	F (S)	H V S		
12	123	F (S)	H V S		
11	189	H (S)	H V S		
10	92	(S) V S	H V S		
7	6	H (S)	H V S		
8	110	(S) V S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		

33	Sample	-	Finish	NA	No Crack	CS	Sealant
33	Base	-	Faced Sealant	NA	No Seal	GH	Choke
33	Door Detail	CH	Gap/Hole	PI	Pest Infestation	SV	Mesh Visible
33	Definition	SV	Mesh Visible	SC	Surface Cracking	WD	Water Damage

2. The moisture readings were taken from the sample area of the EIFS cladding. The data reflects the conditions of the EIFS cladding at the time of the evaluation.

0990

MOISTURE FREE031

APP_1006

On Site EIFS Moisture Evaluation Form

Homeowner BABEE

Date 10/2/04
Page 11 of 1



North South East West Elevation
(circle one)

Core No.	Intrusive Reading	Shathing Base Condition	Framing Base Condition	Notes	Observation/Comments
1	216	H V (S)	H V S		
2	216	H V (S)	H V S		
3	296	H (M) S	H V S		
4	298	H (M) S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		

BP	Base Preparation	-	-	VC	Vertical Crack	FS	Framing Sealant
BS	Base Surface	ES	Exposed Surface	VS	Vertical Sealant	GH	Gap/Hole
DD	Door Detail	GH	Gap/Hole	PI	Pest Infestation	MV	Mesh Vapour
DL	Detail Location	MV	Mesh Vapour	SC	Surface Crack	WD	Window Detail

EIFS moisture readings were completed on site using a moisture meter on EIFS cladding. The data reflects conditions at the time of the inspection. No moisture was detected in the EIFS cladding.

0991

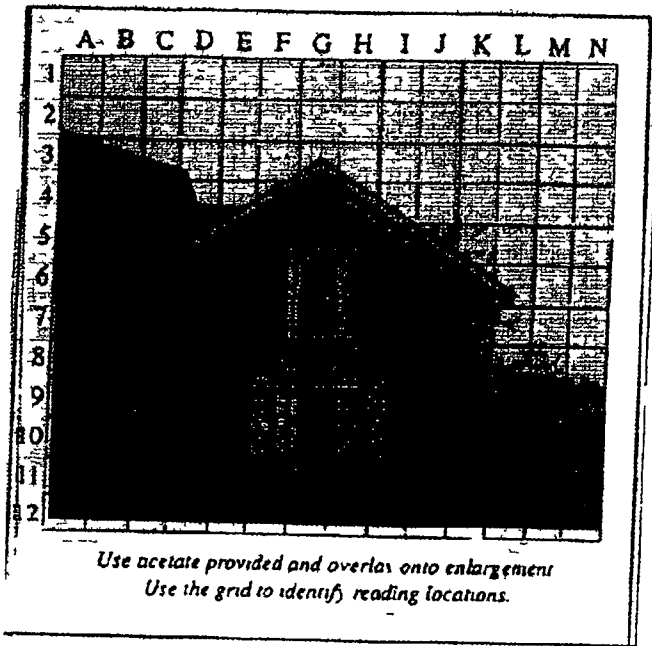
MOISTURE FREE032

APP_1007

On Site EIFS Moisture Evaluation Form

Homeowner BABAE

Date 2/24
Page 12 of 12



North South East West Elevation
(circle one)

Grid No.	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	On Wall Condition	Observation General Note
11	103	(F) S	H S		
11	100	(L) S	H V S		
10	74	(B) S	H V S		
10	112	(B) M S	H V S		
7	88	(F) S	H V S		
8	82	(C) M S	H V S		
8	85	H M S	H V S		
		H V S	H V S		
		H M S	H V S		
		H V S	H		
		H M S	H V S		
		H V S	H V S		

Bump	FS	No Crack	FS	Flashing
Back Slope	FS	No Sealant	CH	Cap/Mole
Door/Door/Joint	CH	P in station	MV	Membrane
Delamination	V	Surface Cracking	WD	Window Detail

Do not use this form for moisture or condensation on the EIFS cladding. The data reflect conditions at the time of test. Current or future moisture or condensation may occur.

0992

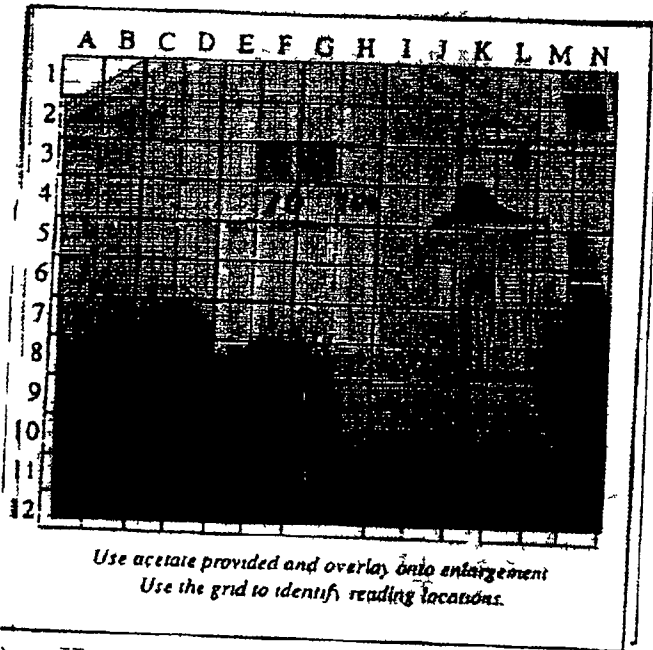
MOISTURE FREE033

APP_1008

On Site EIFS Moisture Evaluation Form

Homeowner BROOK

Date 4-02-07
Page 13 of 13



North South East West Elevation
(circle one)

Grid	Insect Reading	Something B...	Fanning Base Condition	Obs. on	Obs. on
18	181	A S	(H) V S		
H 4	143	(H) I S	(H) V S		
F 4	113	- M S	H (M) S	WD	
		H M S	H M S		
		H M S	H M S		
		H V S	H V S		
		H M S	H V S		
		- M S	H M S		
		H V S	H M S		
		- V S	H V S		
		H M S	H M S		
		- S	H V S		

BB	B m p n	-	F	<	No K x u	S	-	e n
BU	B x u p u	-	F	No	No Sealant	CH	Ca	hole
DD	Door De o	GH	Filled Sealant	PI	Pes. Infestation	VI	Ves	visible
DL	Detachable	MV	Gap/Hole	SC	Surface Cracking	WD	ow	De e ic i

Notes: This form is to be completed for each reading area on the EIFS cladding. The data reflects the condition of the EIFS cladding at the time of the inspection.

0993

MOISTURE FREE034

On Site EIFS Moisture Evaluation Form

Homeowner BABAREE

Date 11-2-21
Page 14 of 1

Use acetate provided and overlap onto enlargement.
Use the grid to identify reading locations.

North South East West Elevation
(circle one)

CH	Int. vs. H. Reading	Sheathing Base Condition	Framing Base Condition	CH	Obs. Location & Details
1	110	H M S	H M S		
1	94	H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		

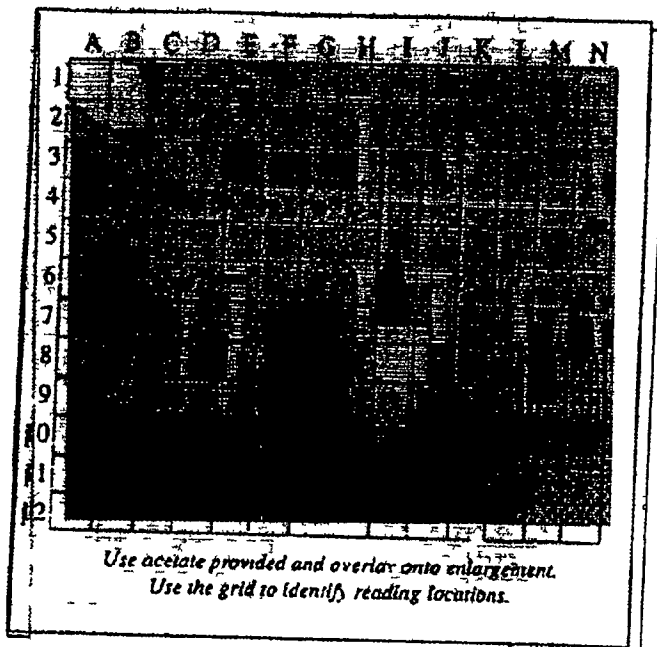
Beam/Pier/Joint	-	Fastener	NK	No Knots	FS	Failed Sealant
Bulkhead	FS	Failed Sealant	NS	No Sealant	GH	Gap Hole
Door/Deck/Opening	GH	Gap/Hole	PI	Perforated	MV	Moisture Visible
Delamination	M	Moisture	SC	Surface Crack/Line	WD	Water Deterioration

EIFS moisture survey is not completed for tested areas of the EIFS cladding. The data reflects conditions at the time of survey. Data are not intended to be used for warranty purposes.

On Site EIFS Moisture Evaluation Form

Homeowner BADAE

Date 02/11/11
Page 15-1



North South East West Elevation
(circle one)

Grid No	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes
4	209	H M S	H M S		
C-6	90	H M S	H M S	SC	Crack by window
C-6	353	H M S	H M S		
E-4	201	H M S	H M S	SC	Crack on bottom right corner of window
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		

BP	Beam Penetration	F	Flashings Loose	NK	No Kickout	FS	Failed Sealant
BS	Back Sloped	F3	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Detail Error	GH	Gap/Hole	PI	Pest Infestation	MV	Mesh Visible
DL	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	Window Deterioration

A partial moisture survey has been completed for selected areas of the EIFS cladding. The data reflect conditions at the time of the survey and are not conclusive indicators of future performance.

0995

MOISTURE FREE036

APP_1011



April 17 2006

Fred Babaee
133 Beaver Dam Rd
Columbia SC 29223

Dear Mr Babaee

In response to your fax dated 4/17/06 I am sending you a copy of the terms and limitations of the MoistureFree Warranty for your perusal with certain areas highlighted to clarify some of the points we ve discussed over the phone We will certainly attempt to satisfy the terms of the warranty as they apply to your home based on the evidence we have received Once you have forwarded to me the detailed estimate by ACE Drywall we will continue to work toward settlement of this claim

Thanks

Tim McLain
800 400 8679 ext 164

20306 North Main Street
Cornelius North Carolina 28031
800 400 8679 Fax 704 896 3426
www.moisturewarranty.com

0996

APP_1012

MoistureFree Warranty

SAMPLE COPY OF
THE TERMS AND LIMITATIONS OF THE

MOISTUREFREE WARRANTY THREE-YEAR LIMITED WARRANTY \$60,000 Full Term Limit and \$20,000 Per Year Maximum Limit

NOTICE

The THREE Year MoistureFree Limited Warranty includes 1 (one) qualified moisture inspection of the warranted home which will be performed 16 to 20 months into the term of the warranty. The THREE-Year MoistureFree Limited Warranty does require the current homeowner to perform normal maintenance on the home during the term of the warranty or risk voiding all or part of the warranty benefits. These normal maintenance requirements are specifically limited to caulking and/or painting of high risk areas identified in the periodic moisture inspection.

THIS LIMITED WARRANTY IS NOT VALID WITHOUT THE MOISTUREFREE WARRANTY AUTHORIZATION CERTIFICATE

The following sample copy of the MoistureFree Warranty is provided for review and marketing purposes only. No MoistureFree Warranty is valid without a MoistureFree Warranty Authorization Certificate which describes the specific limits of the warranty. Following the review of a qualified moisture inspection and acceptance of an application for warranty, a MoistureFree Warranty Authorization Certificate will be mailed to the warranty holder within 60 days of approval.

This limited warranty does not cover consequential or incidental damages. Warrantor's total aggregate liability of this Limited Warranty is limited to \$60,000 during the full term with a \$20,000 per year maximum claim limit unless specified otherwise on the MoistureFree Warranty Authorization Certificate. There are no warranties which extend beyond the face of this Limited Warranty. There are no implied warranties or any other warranties, express or implied, in connection with this Limited Warranty or the MoistureFree Warranty Authorization Certificate on the warranted home, and all such warranties are unconditionally excluded from this Limited Warranty.

To Apply For And Purchase A MoistureFree Warranty

Call 1-800-400-8679

For Claims Qualification Call 704-896 0339

The MoistureFree Warranty is backed by Western Pacific Mutual Insurance Company, an A+ Best rated company.

MFW 3Yr Ver 7 15 03

0997

MoistureFree  Warranty

Dear Homeowner

Moisture problems related to EIFS (synthetic stucco) homes and hardcoat or traditional stucco have created serious concerns for these homeowners. The MoistureFree Warranty was designed to eliminate most of these concerns by providing a cost effective way to protect homeowners from moisture-related damage to their homes' exterior. By combining the MoistureFree Warranty with a comprehensive moisture inspection of the home, homeowners can be assured of having the information they need to prevent moisture from further damaging their home and a warranty to protect them in the case that moisture is located during the term of the warranty.

This booklet explains the MoistureFree Warranty in its entirety, and we encourage you to take the time to **READ THIS INFORMATION CAREFULLY**.

This is not a warranty service contract, but a written Limited Warranty which specifically covers areas of your home directly related to your EIFS (synthetic stucco) or hardcoat stucco system. See "Definitions" section for clarification of these terms.

Please take time now to read this booklet. Familiarize yourself with the Warranty and its limitations. If you have specific questions about your stucco system after reading this information, contact your builder, stucco installer, repair contractor, or moisture inspector first. If you have questions specifically about warranty, including how to purchase a MoistureFree warranty, please call (704) 896-0339.

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This Limited Warranty is administered by
Moisture Warranty Corporation
20306 North Main St
Cornelius, North Carolina 28031
704-896-0339

Section I - Definitions

- 1 Administrator—RWC Stucco Warranty Corporation (RWCSWC) is the administrator of this warranty RWCSWC is neither Warrantor nor Insurer
- 2 Arbitrator—A representative of the Academy of Conciliators or other independent arbitration service agreed upon by you, the Purchaser, and the Administrator to determine coverage on an Unresolved Warranty Issue
- 3 Consequential Damage—All consequential damage including but not limited to damage to the Home that is caused by a warranted Defect but is not itself a warranted Defect and costs of shelter, transportation, food, moving, storage or other incidental expenses related to relocation during repairs
- 4 Defect—A condition of any item warranted by this Limited Warranty which exceeds the allowable tolerances specified in this warranty Specifically any warranted area of the home s exterior cladding system which contains moisture equal to or in excess of 25%
- 5 Effective Date of Warranty—The effective date is indicated on the MoistureFree Warranty Authorization Certificate The effective date will be on or around the date of the original moisture inspection which qualified the home for a MoistureFree Warranty
- 6 EIFS exterior insulating and finishing system or synthetic stucco is a type of exterior cladding system that typically uses a rigid insulating board which is applied directly to the sheathing of the home and is covered with a base and finish coat which looks similar to traditional cement-type stucco
- 7 Hardcoat or traditional stucco—A stucco system which typically uses a metal lath or mesh which is applied to the sheathing of the home and covered with a cement type coating
- 8 Home—The single family dwelling identified on the MoistureFree Authorization Certificate The home may be a townhome, condominium or duplex
- 9 Limited Warranty—The terms and conditions in this book including any applicable addenda.
- 10 Purchaser—You or perhaps someone else, such as a builder or contractor, who purchased this Limited Warranty on your behalf
- 11 MoistureFree Warranty Application Form This form is completed by either the inspector who tests the home for moisture, or by a representative of MoistureFree who uses the moisture inspector s information to complete the form
- 12 MoistureFree Warranty Authorization Certificate—This certificate is proof of the home s warranty coverage and contains information about the specific limits of coverage for a particular home if any
- 13 Moisture Inspection—A moisture inspection of a home performed by a qualified individual using the MoistureFree Inspection Protocol which is used to assess the moisture content of the exterior framing and sheathing of a home
- 14 Moisture Location—A location is any area equal to or less than 36 in diameter which contains a moisture reading which is equal to or in excess of 25%
- 15 Normal Maintenance—Caulking sealing or painting which helps to prevent weather damage to exterior elements of the home
- 16 Unresolved Warranty Issues—All requests for warranty performance, demands, disputes controversies and differences that may arise between the parties to this Limited Warranty that cannot be resolved among the parties

Section II

The Limited Warranty

A Introduction to the Limited Warranty

- 1 This booklet provides specific details, conditions and limitations of the Limited Warranty, including procedures for requesting warranty performance and for binding arbitration, in accordance with the procedures of the Federal Arbitration Act. Additional information can be received by calling RWCSWC at (717) 561-4480. Read this document in its entirety to understand the protection it affords, the exclusions applicable to it, the Warranty Standards which determine its interpretation and operation and your responsibilities.
- 2 This is NOT an insurance policy, a maintenance agreement, or a service contract. It is an explanation of what you, the Purchaser, can expect from this Limited Warranty.
- 3 You are responsible for the maintenance of your Home. General and preventative maintenance are required to prolong the life of your Home.
- 4 This Limited Warranty is AUTOMATICALLY TRANSFERRED to subsequent Owners during the term of this Limited Warranty.
- 5 This Limited Warranty is subject to changes required by various regulating bodies.

B Terms of Warranty

- 1 In the event of the failure of a sealant or flashing on the home's exterior, Warrantor will have a qualified repair contractor make repairs or modifications to the sealant or flashing as necessary to seal or flash the area from future failure.
- 2 Warrantor may, also at its sole discretion, choose to pay the homeowner to have repairs made to the extent of the warranty coverage. A sealant or flashing failure is defined as the inability of a sealant or flashing to adequately prevent excessive moisture from entering into or behind the exterior cladding of the home.
- 3 Excessive moisture is defined as any moisture reading equal to or above 25% which is determined by using an electrical resistance

type moisture meter.

- 4 Warrantor will be responsible only for the improvement of the sealant or flashing component, and is not responsible for any damage that may, or may not, have been present at or around the specific area of the sealant or flashing failure before the warranty was in effect.
- 5 All claims of failure are limited to \$500 per Moisture Location and up to 40 Moisture Locations per home with a maximum per policy limit of \$20,000 per year or \$60,000 collectively over the full term of the limited warranty.
- 6 Warrantor reserves the right to make repairs or modifications to the area of failure based on standard industry practices and will have full discretion over the type of repair or modification that is to be made at the specific area that is determined to have high moisture behind the exterior cladding.

C Exclusions and Special Provisions

- 1 Areas of the home that are damaged while under warranty with the damage being caused by naturally occurring weather forces such as tornadoes, hurricanes, floods, winds in excess of 70 miles per hour, or damage caused by abuse such as, but not limited to, pressure washing or automatic sprinkler over-spray of the exterior cladding will not be repaired under this warranty.
- 2 Warrantor shall not be responsible for any failure that can be shown to be caused by the failure of the Homeowner, after the Effective Date of the Warranty, to perform normal maintenance.
- 3 This Limited Warranty shall be interpreted and enforced in accordance with the laws of the state in which the home is located.
- 4 If any provision of this Limited Warranty is determined by a court of competent jurisdiction to be unenforceable, that determination will not affect the validity of the remaining provisions.
- 5 If actions by the Warrantor on any obligations under this Limited Warranty are delayed by an event beyond its control, such performance will

be excused until the delaying effects of the event are remedied. Such events include, but are not limited to: acts of God, acts of the common enemy, war, riot, civil commotion or sovereign conduct, or acts or omissions by you or any other person not a party of this Limited Warranty.

- 6 Under this Limited Warranty, the Warrantor is not responsible for exact color, texture or finish matches in situations where materials are replaced or repaired, or for areas repainted or when original materials are discontinued.
- 7 This warranty specifically covers areas affected by high moisture behind the exterior cladding of the home, but DOES NOT cover damage caused by moisture in these areas other than the repair or modification of the area to prevent moisture from continuing to damage the affected area.
- 8 This warranty does not provide coverage for structural defects. It does not provide coverage for moisture damage to windows, doors, interior elements of the home or any other area of the home not directly causing the failure of the exterior cladding system. For example, water damage to drywall, wallpaper, carpets and floors, among other things, are not covered.
- 9 Window systems are commonly damaged by moisture and lack of maintenance, and this warranty DOES NOT cover damage to the window system.
- 10 This warranty DOES NOT cover in any way problems associated with, caused by, contributed to or aggravated by mold, mildew or fungus, and DOES NOT cover, in any way, health related problems or conditions associated with, caused by, contributed to or aggravated by mold, mildew, or fungus. This warranty specifically excludes bodily injury or property damage which would not have occurred in whole or in part, but for the actual alleged, or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any fungi or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material, or product contributed concurrently or in any sequence to such injury or damage. This warranty does not cover any loss, cost, or ex-

penses arising out of the abating, testing for monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, fungi or bacteria, by any insured or by any other person or entity.

- 11 This Limited Warranty does NOT cover moisture problems that are not related directly to the EIFS or stucco cladding. This includes moisture problems or damage caused by roof leaks, foundation leaks, at- or below-grade framing, basement leaks, improper drainage, pest infestation, downspouts, gutters, or the failure of any flashing or sealant joint that is not in direct contact with the cladding system.
- 12 This warranty does NOT provide any coverage for repairs or modifications related to wood-destroying insects, such as termites and ants.

D Methods For Making Repair Claims

- 1 A qualified interim moisture inspection must be performed on the home. Unless an interim moisture inspection is specifically included in your Limited Warranty agreement, this test must be performed at the expense of the homeowner, unless specifically stated otherwise.
- 2 If at the time of the moisture test, elevated moisture readings (in excess of 25%) are found at locations covered in the MoistureFree Warranty, Warrantor will make necessary repairs or modifications based on the terms of the Limited Warranty.

E Resolving Warranty Issues

- 1 Your request for warranty performance should be in writing to RWCSWC. Include name, warranty ID number, address, reasonably specific description of the warranty issue, and photos, if available.
- 2 Your request for warranty performance must be postmarked no later than 30 days after the expiration of the applicable warranty period.

F Arbitration

- 1 If a request for warranty performance to the Warrantor does not result in satisfactory action within a reasonable time written notice must be given to RWCSWC, 5300 Derry Street, Harrisburg, Pennsylvania 17111-3598, Attn Warranty Resolution Department
- 2 This notice should describe each deficiency in reasonable detail and should be forwarded by certified mail, return receipt requested
- 3 Please note that a written request for warranty performance must be postmarked no later than thirty (30) days after the expiration of the applicable warranty period
- 4 Your notice to RWCSWC must contain the following information
 - A MoistureFree Warranty Authorization Certificate number and effective date of your warranty
 - B Your name, address and phone number (including home and work numbers)
 - C Reasonably specific description of the warranty item(s) to be reviewed
 - D A copy of any previous written notice to RWCSWC
 - E Photograph(s) may be required

G Conditions of Arbitration

- 1 You have an obligation to cooperate with RWCSWC's investigation of your warranty request
- 2 From time to time, RWCSWC may request information from you regarding an alleged defect Failure by you or your appointed representative to respond with the requested information within thirty (30) days of the date of RWCSWC's request can result in the closing of your warranty file
- 3 When a request for warranty performance is filed and the deficiency cannot be observed under normal conditions it is your responsibility to substantiate that the need for warranty performance exists including any cost involved If properly substantiated you will be reimbursed by the Warrantor
- 4 You begin the arbitration process by giving RWCSWC written notice of your request for arbitration of an unresolved warranty issue Within twenty (20) days after RWCSWC's

receipt of your notice of request for arbitration, any unresolved warranty issue that you have with the Warrantor shall be submitted to an independent arbitration service This binding arbitration is governed by the procedures of the Federal Arbitration Act, 9 U S C 1 et seq If you submit a request for arbitration you must pay the arbitration fees before the matter is submitted to the arbitration service

- 5 After arbitration the Arbitrator shall have the power to award the cost of this fee to any party or to split it among the parties to the arbitration
- 6 The arbitration shall be conducted in accordance with this Limited Warranty and the arbitration service's rules and regulations to the extent that they are not in conflict with the Federal Arbitration Act Within one (1) year after an arbitration award, either party may apply to the U S District Court where the Home is situated to confirm the award
- 7 RWCSWC's receipt of a written request for arbitration in appropriate form shall stop the running of any statute of limitations applicable to the matter to be arbitrated until the Arbitrator renders a decision The decision of the Arbitrator shall be final and binding upon all parties
- 8 Since this Limited Warranty provides for mandatory binding arbitration of unresolved warranty issues, if any party commences litigation in violation of this Limited Warranty, such party shall reimburse the other parties to the litigation for their costs and expenses including attorney fees, incurred in seeking dismissal of such litigation
- 9 The Warrantor shall have sixty (60) days from the date RWCSWC receives the Arbitrator's award to comply with the Arbitrator's decision
- 10 Warranty compliance will begin as soon as possible and will be completed within the sixty-day compliance period, with the exception of any repair that would reasonably take more than sixty (60) days to complete including but not limited to repair delayed or prolonged because of inclement weather

- 11 The Warrantor will complete such repair or replacement as soon as possible without incurring overtime or weekend expenses
- 12 You may request a compliance arbitration within twenty (20) days after the sixty-day compliance period has expired by giving RWCSWC written notice of your request. You must pay the fees for the compliance arbitration prior to the matter being submitted to the arbitration service.
- 13 You must provide the Warrantor, or if applicable RWCSWC with reasonable weekday access during normal business hours in order to perform its obligations. Failure by you to provide such reasonable access to the Warrantor may relieve the Warrantor of its obligations under this Limited Warranty.

Section III

Warranty Standards

The following Warranty Standards are applicable to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

<u>1 Stucco Systems</u>	<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
	1.1 Small cracks appear on the surface of the stucco	No action required. Most stucco systems have incidental hairline cracks on the surface which rarely allow moisture penetration.	This is only considered a deficiency if the immediate areas around the cracks test positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	1.2 Stucco appears wavy or uneven along the plane of a wall or accent	Uneven application of the stucco system will not typically cause moisture penetration.	Uneven application may need to be repaired for aesthetic reasons but is not covered under the Limited Warranty.
	1.3 Styrofoam like insulation layer of the stucco system continues below the soil level	All insulated stucco systems should terminate at least 4" to 8" above the soil line to prevent termites and other pests from entering into the wall system.	The Limited Warranty does not cover modifications to the home related to pest control.
	1.4 Stucco accents over doors, windows, and other areas are flat and deeper than 1/5" (at a 90 degree angle to the wall) and may collect water.	All flat accents deeper than 1/5" should be caulked to prevent moisture from penetrating the system through faults or cracks.	This is only considered a deficiency if the immediate areas around the accent test positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
<u>2 Caulking</u>	<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
	2.1 Caulking around doors, windows, vents, fixtures, utility breaches, hose bibbs, or any other breaches of stucco system appears to be failing.	Caulking is a critical element in the upkeep of any home and requires regular maintenance by the homeowner. Any area where caulking appears to be failing should be repaired as soon as possible.	This is only considered a deficiency if the immediate areas around the caulking test positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	2.2 Caulking (glazing) on the glass of windows and doors appears to be failing.	Glazing caulk should be replaced anywhere it appears to be failing. The builder or door/window manufacturer's warranty may be applicable to this type of problem. Contact either the builder or the product manufacturer to check warranty status.	Windows and doors which have glass elements often experience failures with the glazing caulk. This failure is not applicable to this limited warranty. However, the window or door manufacturer may have a warranty for such occurrences.
	2.3 No expansion joints (backer rod joints) are installed around doors, windows, or other breaches.	Recessed backer rod joints are now recommended by many stucco manufacturers at the time of original construction. However, these types of joints should typically not be retrofitted on existing homes.	The limited warranty may apply to a case affected by the lack of, or failure of, a backer rod joint. However, installation of recessed backer rod joints is not required for warranty compliance.

2 Caulking (cont)

Observation

Action Required

Comments

2 4 Caulk on some areas of the home is fine while other areas appear to be fading, peeling cracking or chipping

Caulk has a variable service life depending on exposure expansion, climate and other factors Homeowners should take steps to repair any areas of caulk that appear to be failing

Caulking is a normal maintenance requirement for any home and a caulking deficiency is only warranted if the immediate areas around the failed caulk test positive for moisture equal to or greater than 25% and no other source of the moisture can be determined

3 Flashing Systems

Observation

Action Required

Comments

3 1 Kickout flashings (rake flashings or diverter flashings) appear to be missing or failing

All kickout flashings should be visually checked from time to time in order to assure that they are unobstructed and functioning properly

All stucco homes should have kickout flashings installed at appropriate locations This limited warranty applies to failing kickout locations that have not been specifically excluded from the limited warranty

3 2 Flashing around decks stairways porches chimneys windows or other attachments appears to be failing

Severe weather may cause flashing to momentarily fail under extreme conditions No action is typically required unless failure occurs more than occasionally or is extreme in nature

Flashings that cannot be inspected using visual observation are not applicable to this limited warranty

3 3 Head flashing above windows and doors is missing or failing

If an area above or around a window or door is being damaged by the lack of or improper function of a head flashing modifications should be made to correct the problem

Areas around windows or doors that experience elevated levels of moisture are applicable to this limited warranty if they have not been specifically excluded and are within the limits of the warranty

3 4 The chimney chase is constructed of wood and does not appear to have a chimney cap or proper flashing

Chimney chases attached to the side of a home commonly are missing kickout flashings which must be installed Also a chimney cap which covers the entire chimney and continues down the edges 4 should be installed

Only chimneys that are reasonably accessible to testing are applicable to this Limited Warranty This is only considered a deficiency if the immediate area of the chimney tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined

3 5 Stucco has been used to cover a flat area (wider than 1 5") over a wall chimney top canopy or other area

Stucco finishes are not designed to be used as roofing or flashing materials These areas should be modified so that the stucco is protected from moisture

Areas of the home that use stucco as a waterproofing system roofing or flashing system are not applicable to this Limited Warranty

3 6 Gutters are overflowing in some places and the downspouts leak on to the stucco surface

It is VERY important to keep gutters and downspouts clear of debris Leaking or improperly installed gutters should be fixed to prevent any moisture from contacting the stucco surface

Gutter systems can significantly contribute to moisture problems related to stucco systems and must be regularly maintained by the homeowner

<u>4 Window Systems</u>	<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
	4 1 Windows appear to have rotted around sill, sash, jamb or molding	All windows with wood elements require proper maintenance which includes periodic caulking and painting. Areas of extreme rot may need to be replaced.	Rotted wood is common in all types of wood windows and is not applicable to this warranty. Failures directly related to excess moisture around the windows are limited to modifications necessary to prevent moisture from penetrating into or behind the stucco system.
	4 2 Water is entering into the interior of the home through a faulty window.	Windows which do not close properly or have warped may need to be replaced in order to stop interior leakage.	This is only considered a deficiency if the immediate area around the exterior of the window tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	4 3 Wooden double or single hung windows (with or without vinyl or metal cladding) appear to be staining in the corners or are missing caulk.	All double or single hung windows need to be caulked at the lower joints of the sill and the jamb. Removal of the sash track may be necessary in order to assure a complete seal of the joint. Further modification may be necessary if the joint cannot be adequately sealed, including window pans or window replacement.	This is considered a deficiency only if the immediate area around the exterior of the window tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined. Areas specifically identified in the MoistureFree Warranty Authorization Certificate will not apply to this Limited Warranty.
	4 4 Windows within doors (patio doors, French doors, sliding doors, etc.) appear to have gaps between the glass and the wood or metal.	Glazing and caulking are common maintenance issues in any window or door. Homeowners should make periodic checks of these areas to assure that the caulking or glazing is adequate.	Glazing and caulking of the window construction may be warranted by the window or door manufacturer. This is considered a deficiency only if the immediate area around the exterior of the door or window tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	4 5 The glass within the window is cloudy and appears to have moisture trapped between the panes.	Leaks or cracks in the thermal seal of a window allow moisture to get trapped between the glass panes. The window must be replaced to correct the problem.	Broken or leaking window seals are not problems related to the stucco system and are not applicable to this Limited Warranty.

<u>5 Other Areas</u>	<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
	5 1 The exterior stucco cladding has experienced impact damage	Most impact damage to the stucco system is superficial and requires aesthetic repair only	This is considered a deficiency only if the immediate area around the damaged stucco tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined
	5 2 Ivy or other vine type plants have attached to the stucco cladding	All landscaping should be planted or trimmed back at least 12" from the exterior in order to prevent damage to the stucco and to allow for adequate inspection	This is not a warranted defect. Areas that can not be effectively tested due to landscaping may be excluded from this Limited Warranty
	5 3 Moss, mold, or algae have discolored the surface of the stucco	Northern and southern exposures of homes typically have discoloration due to algae growth. This rarely affects the condition of the stucco and the algae can be removed using approved cleaners. NEVER USE A HIGH PRESSURE WASHER ON THE SURFACE OF STUCCO	This is not a warranted defect. Algae growth on walls is common and often mistaken to be associated with interior moisture in the walls
	5 4 The automatic sprinkler system is overspraying onto the home	Sprinkler heads should be adjusted or changed to ensure that water does not hit the surface of the home	This is not a warranted defect and may void this Limited Warranty if found to be the cause of moisture in otherwise warranted areas of the home
	5 5 Interior leaks are occurring around or directly below the chimney area	Chimneys should be covered with a chimney cap which covers the entire horizontal exposure of the top of the chimney and continues down each side at least 4". Flashing around the chimney at the roof line should also be checked for proper function	This is not a warranted defect. Stucco should not be used as a roofing or flashing substitute. If possible, check with the original builder to request repair or modifications or with the builder's insurance company
	5 6 Small rust colored spots and streaks appear on the surface of the stucco	Typically, these rust colored spots and streaks are caused by iron fragments in the finish coat of the stucco. No action is required, but removal of the iron fragments at the surface will often solve the problem	Discoloration in the stucco is an aesthetic issue and is not a warranted defect
	5 7 Loose chipping paint on the surface of the stucco	The finish coat of the stucco has most likely been painted. Once the stucco home has been painted, it will need to be maintained and repainted to maintain the appearance	Aging and failure of paint are typically not related to interior wall moisture and therefore are not applicable to this Limited Warranty

<u>5 Other Areas (cont.)</u>	<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
	5 8 White chalky or yellowish deposits or stains are found on the stucco finish	These stains referred to as efflorescence can be cleaned using special cleaners designed for this problem. The source of the stain should be sealed to prevent damage to the finish and base coat of the stucco system.	Efflorescence often occurs under decks stairs or other attachments to the home. It is not related to interior wall moisture and is not applicable to this Limited Warranty.
	5 9 Shutters are attached through the stucco and do not appear to be sealed	Shutter attachments that leave a hole should be removed and caulked to reduce the chance of leaking. Snap on shutter brackets are preferable and reduce the chance of future problems.	This is considered a deficiency only if the immediate area around the shutter tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	5 10 Dead valleys or roof and wall intersections where the roof is angled down toward a wall or a corner which does not appear to drain properly	Roof to wall intersections which do not allow proper drainage should be modified in order to create a slope that allows drainage. Wall flashing should extend 8" to 14" up the wall and run to the end of roof/wall edge and be properly finished.	Poor roof/wall intersection designs can contribute to leaks in the interior of the home but are not typically related to the stucco cladding and are not applicable to this Limited Warranty.
	5 11 Deck, stair railing or other attachments appear to penetrate the stucco and are not sealed	Stresses on attachments to the house can expose openings in the stucco which must be sealed with an appropriate flexible caulk. Attachments to the home can loosen over time and should be secured to prevent movement.	This is considered a deficiency only if the immediate area around the attachment tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	5 12 Below grade framing has been covered by landscaping or backfill and may be allowing moisture penetration into the wall	Below grade framing should be appropriately waterproofed and may require the removal of the exterior soil to allow proper treatment.	Moisture intrusion related to below-grade framing cannot be visually confirmed in most cases and is typically not related to the stucco cladding. Repairs related to below grade framing are not applicable to this Limited Warranty.
	5 13 Patios stairs planters flower boxes or other attachments may have stucco between the foundation or framing and the attachment	If the stucco was applied to the home before the exterior attachments there is a possibility that the stucco is trapped between the home and the attachment. If the stucco system includes an insulation board component moisture or pest problems may occur in this area. Further destructive inspection of the area may be required.	The inspection protocol required for this Limited Warranty does not include any type of destructive testing and therefore cannot comment on areas that cannot be tested or observed. Unobserved areas or areas that are impossible to test are excluded from this Limited Warranty.

Section IV. Requesting Warranty Performance

A Notice To Warrantor

If a warranted defect occurs you must notify the Administrator to review the item. All such notices must be presented in writing to RWCSWC Administrator, 5300 Derry Street, Harrisburg, Pennsylvania 17111 3598, Attn: MoistureFree Warranty Resolution Department, by certified mail, return receipt requested, within a reasonable time after the situation arises. Requests for warranty performance postmarked more than thirty days after the expiration of the term of this Limited Warranty will not be honored.

B Purchaser's Obligations

- 1 Your notice to the Administrator must include the following items:
 - a MoistureFree Authorization Certificate number and the Effective Date Of Warranty
 - b Your name, address, and phone number (include home and work numbers)
 - c Reasonably specific description of the warranty item(s) to be reviewed
 - d Photograph(s) may be required
- 2 You have an obligation to cooperate with the Administrator's mediation, inspection, and investigation of your warranty request. From time to time the Administrator may request information from you regarding an alleged defect. Failure by you or your appointed representative to respond to the requested information within thirty (30) days of the date of the Administrator's request can result in the closing of your warranty file.

C Mediation and Inspection

Within thirty (30) days following the Administrator's receipt of proper notice of request for warranty performance, the Administrator may review and mediate your request by communicating with you, and any other individuals or entities who the Administrator believes possesses relevant information. If, after thirty (30) days the Administrator has not been able to successfully mediate your request, the Administrator will notify you that your request has become an Unresolved Warranty Issue. At any time following the receipt of proper notice of your request for warranty performance, the Administrator may schedule an inspection of the item. You must provide the Administrator reasonable access for any such inspection. When a request for warranty performance is filed and the deficiency cannot be observed under normal conditions, it is your responsibility to substantiate that the need for warranty performance exists including any costs involved. If properly substantiated, you will be reimbursed by the Administrator.

D Arbitration

- 1 You begin the arbitration process by giving the Administrator written notice of your request for arbitration of an Unresolved Warranty Issue. Within twenty (20) days after the Administrator's receipt of your notice of request for arbitration, any Unresolved Warranty Issue that you have with the Warrantor shall be submitted to the National Academy of Conciliators or another independent arbitration service upon which you and the Administrator agree. The **BINDING** arbitration is governed by the procedures of the Federal Arbitration Act 9 U.S.C. 1 et seq. If you submit a request for arbitration, you must pay the arbitration fees before the matter is submitted to the arbitration service. After arbitration, the Arbitrator shall have the power to award the cost of this fee to any party or split it among the parties to the arbitration. The arbitration

shall be conducted in accordance with this Limited Warranty and the arbitration rules and regulations to the extent that they are not in conflict with any Federal Arbitration Act. Within one (1) year after an arbitration award, either party may apply to the U.S. District Court where the Home is situated to confirm the award. The Administrator's receipt of written request for arbitration in appropriate form shall stop the running of any statute of limitations applicable to the matter to be arbitrated until the Arbitrator renders a decision. The decision of the Arbitrator shall be final and binding on all parties. Since the Limited Warranty provides for amendatory binding arbitration of Unresolved Warranty Issues, if any party commences litigation in violation of this Limited Warranty, such party shall reimburse the other parties to the litigation for their costs and expenses, including attorney fees incurred in seeking dismissal of such litigation.

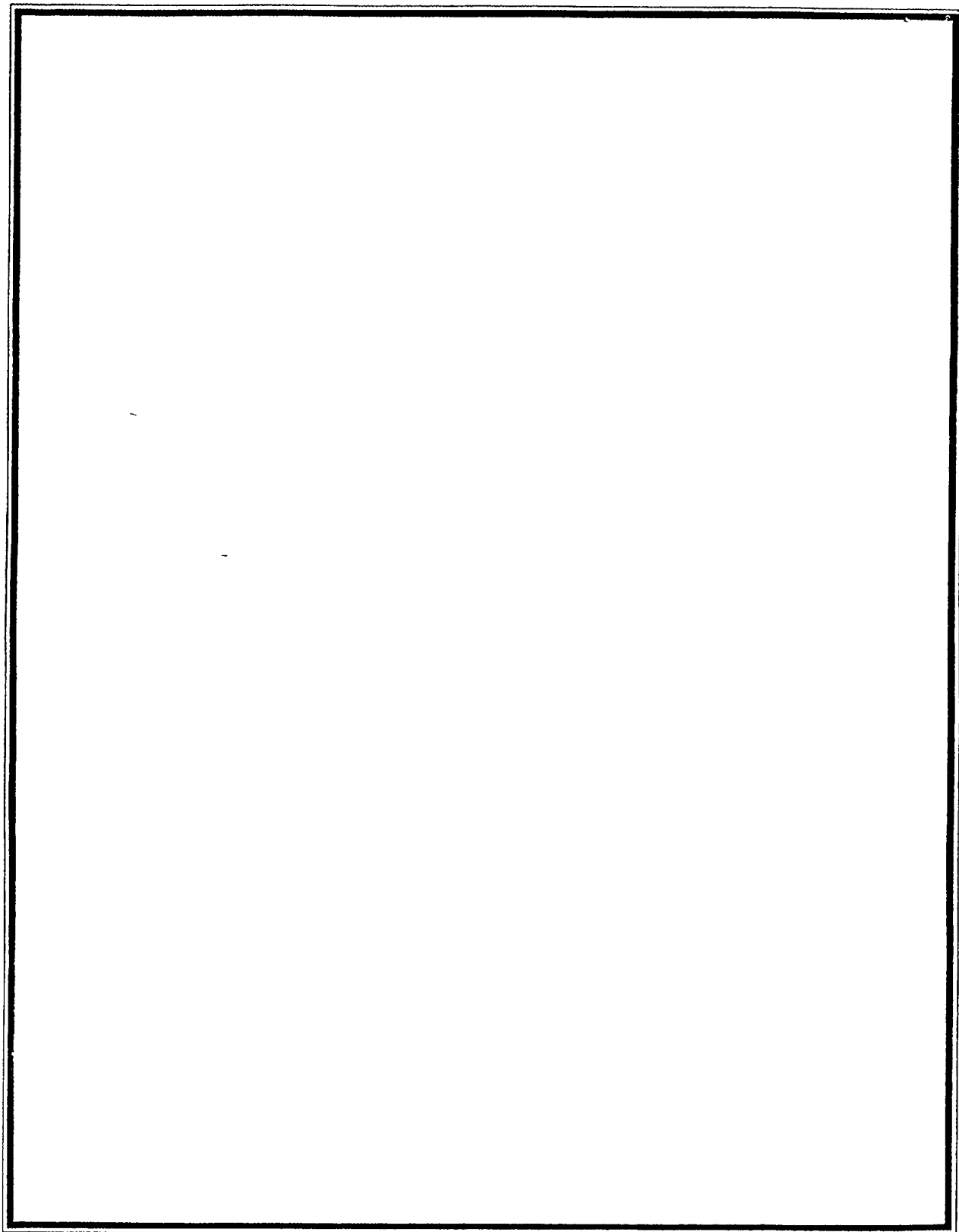
- 2 The Warrantor shall have sixty (60) days from the date the Administrator receives the arbitrator's award to comply with the Arbitrator's decision. Warranty compliance will begin as soon as possible and will be completed within the sixty-day compliance period with the exception of any repair that would reasonably take more than sixty (60) days to complete, including but not limited to, repair delayed or prolonged by inclement weather. The Warrantor will complete such repair or replacement as soon as possible without incurring overtime or weekend expenses. You may request a compliance arbitration within twenty (20) days after the sixty-day compliance period has expired by giving the Administrator written notice of your request. You must pay fees for the compliance arbitration prior to the matter being submitted to the arbitration service.
- 3 You must provide the Warrantor with reasonable weekday access during normal business hours in order to perform its obligations. Failure by you to provide such access to the Warrantor may relieve the Warrantor of its obligations under the terms of this Limited Warranty.

E Conditions of Warranty Performance

- 1 When your request for warranty performance is determined to be a warranted issue, the Warrantor reserves the right to repair or replace the warranted item, or to pay you the reasonable cost of repair or replacement up to the limits of the warranty.
- 2 If the Warrantor pays the reasonable cost of repairing a warranted item, the payment shall be made to you and to any mortgage or mortgage's successor as each of your interests may appear, provided that the mortgagee has notified the Administrator in writing of its security interest in the Home prior to such payment. Warrantor shall not have any obligation to make payment jointly to the Purchaser and the mortgagee where the mortgagee has not notified the Administrator in writing of its security interest in the Home prior to such payment. Any mortgagee shall be completely bound by any mediation or arbitration relating to a request for warranty performance between you and the Warrantor.
- 3 Prior to payment for the reasonable cost of repairs or replacement of warranted items, you must sign and deliver to the Administrator a full and unconditional release in recordable form, of all legal obligations with respect to the warranted Defect and any condition arising from the warranted item.
- 4 The repaired or replaced warranted item will continue to be warranted by this Limited Warranty for the remainder of the applicable period of coverage.
- 5 If the Warrantor repairs, replaces or pays you the reasonable cost to repair or replace a warranted item, the Warrantor shall be subrogated to all your rights of recovery against any person or entity. You must execute and deliver any and all instruments and papers and take any and all other actions to secure such rights, including but not limited to, assignment of proceeds of any other insurance or other warranties to the Warrantor.
- 6 Any Warrantor obligation is conditioned upon your proper maintenance of the Home, common elements, and grounds to prevent damage.

due to neglect, abnormal use, or improper maintenance

- 7 If request for performance under this Limited Warranty involves a common element in a condominium, the request must be made by an authorized representative of the condominium association
- 8 If the request for warranty performance under the Limited Warranty involves a common element affecting multiple units and all affected units are not warranted by the MoistureFree Warranty the Insurer's liability will be limited to only those units warranted by the MoistureFree Warranty. The limit of liability shall be prorated based upon the number of units warranted by this Limited Warranty



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1012



APP_1028



FROM

FAX NO 18033330143

Apr 17 2006 01 21PM P2

Fariborz Z Babae
133 Beaver Dam Rd
Columbia S C 29223
Phone 803-788-9589
Cell 803-608-2743

Re Moisture Warranty certification # 411014

Dear Mr Tim McClain

We have purchased the moisture warranty services November of 2004 in accordance with recommendation from your stucco inspector in Columbia South Carolina. We have spent a tremendous amount of money to run a moisture report on our stucco from Mr Frank Clark and we have discovered some problems

I sent you this stucco report in January of 2005, I will need your attention on this matter ASAP I have received a verbal estimate from ACL Drywall here in Columbia for over \$24 000 00 you have received an estimate from Realtors friends for over \$17 000 00 and now you have an estimate from performance Exterior for \$9 643 00

It is obvious that cost of repair is far more than \$2000 00 or \$3 000 00 that you are proposing I suggest you send me a check for \$20 000 00 and I will cover the rest of repair out of my own pocket

You have 10(ten) days to respond to my letter or I have to take this case to our attorney here in Columbia South Carolina

CC
ROGERS TOWNSEND & THOMAS PC
Bob Wood

Sincerely


Fariborz Z Babae

Moisture Free222

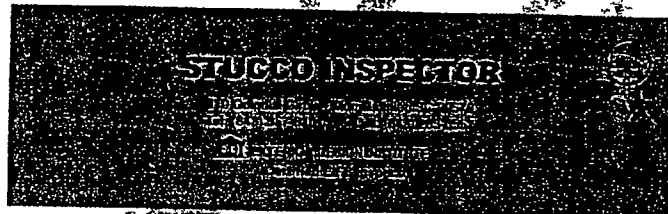
1013

APP_1029

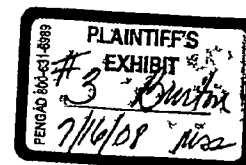


ReportMakerPro

Protocol Inspection Report By



Report Prepared For
Home of Fred Babee
133 Beaver Dam Rd
Columbia S C 29223



THIS IS NOT A WARRANTY, it is a moisture inspection which follows the protocol testing and reporting procedures required to apply for a MoistureFree Warranty. For more information about obtaining a MoistureFree Warranty on your residence contact your home inspector or call 1 800-400 8679 or visit www.moisturewarranty.com. ReportMaker Pro is a registered trademark of Moisture Warranty Corporation www.reportmakerpro.com

Interim Inspection Report

Project Information

OWNER INFORMATION		BUYER INFORMATION	
Owners	Fred Babaee	Buyers	
Property Address	133 Beaver Dam Rd	Buyers Address	
City, State, ZIP	Columbia S C 29223	City, State, ZIP	
Phone	803-786 8646	Phone	
FAX		FAX	
Owners Realtor		Buyers Realtor	
Realty Company		Realty Company	
Phone		Phone	
FAX		FAX	
PROPERTY INFORMATION		INSPECTION INFORMATION	
Type of Exterior Cladding	EIFS	Date of Inspection	02-21-2006
System Manufacturer	Undetermined	Inspector	DAVID BLACKBURN
Mesh Color		Present at Inspection	Mr Babaee
Underlying Substrate	Oriented Strand Board	Temperature / Humidity	65/55
Age of Property		Weather	Sunny
Square Footage		Last Rain	Within past few weeks

Window Data		
Type of Windows	Quantity	Comments
Total Number of Window Units		

The Home of Fred Babaee
 133 Beaver Dam Rd
 Columbia S C 29223

Interim Inspection Report

Summary Check List

Item	Pass	Fail	Comments
Caulking Around Window Frame		X	Touch up caulk needed at some areas
Caulking At Window Joints / Miter	X		
Caulking Around Door Frame		X	Touch up caulk needed at some areas
Caulking At Door Joints / Miter	X		
Caulking Around Other Breaches	X		
Flat Accents Caulked or Angled		X	Flat accents and/or quoins (corner accents) need to be caulked
Soffit, Frieze & Fascia Boards Caulked	X		
Flashings / Details	Pass	Fail	Comments
Kickout Flashings / Roof / Wall	X		
Deck Flashings		X	
Other Attachment Flashings		X	
Porches / Stoop Flashing		X	
Chimney Cap		X	
Chimney Cricket		X	
Window Head Flashing			Window head flashing is not installed
Door Head Flashing			Door head flashing is not installed
Column Flashing		X	
EIFS Details	Pass	Fail	Comments
EIFS Is Terminated Above Grade	X		
EIFS Is Sealed At Bottom	X		
EIFS Is Terminated At Porches	X		

The Home of Fred Babaee
133 Beaver Dam Rd
Columbia S C 29223

Interim Inspection Report

Summary Check List Cont

Miscellaneous				Comments
Evidence Of Sprinkler Overspray		X		
Gutters Clean & Functioning	X			
Down Spout Fasteners Sealed			X	
Cracks Or Impact Damage	X			Exposed cracks or impact damage need to be sealed or repaired
Delaminating At Foam/ Substrate		X		
Exterior Evidence Of Pest Infestation		X		
Adequate Slope Of Grade Away	X			
Crawlspace Inspection Made		X		
Property Located Near Body of Water If Yes, Describe	X			Lake behind house

The Home of Fred Babaee
133 Beaver Dam Rd
Columbia S C 29223

3 B

1017

APP_1033

Interim Inspection Report

Inspectors Summary Report

Rechecked some areas that was previously reported high moisture This was done with a Delmhorst Meter Some windows have caulk failure and need to be touched-up Accents above window and doors are flat and need to be angled or caulked These accents may be the reason for the high readings that were obtained during this inspection There were several areas that had high readings and substrate rot these are noted in the report There is one kickout that has caulk failure and needs to be recaulked All kickout flashing seems to be functioning properly All other kickouts and windows were scanned with a Tramex meter and readings were dry

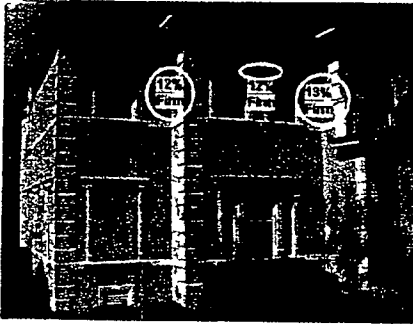
The Home of Fred Babaee
133 Beaver Dam Rd
Columbia S C 29223

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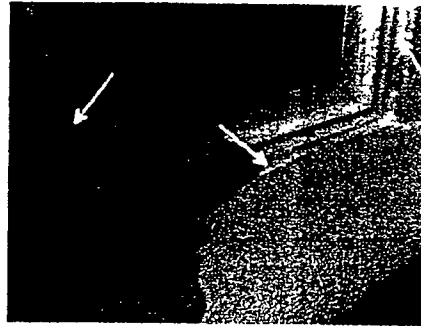
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APP_1034

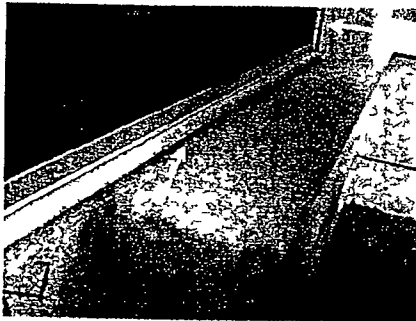
Interim Inspection Report



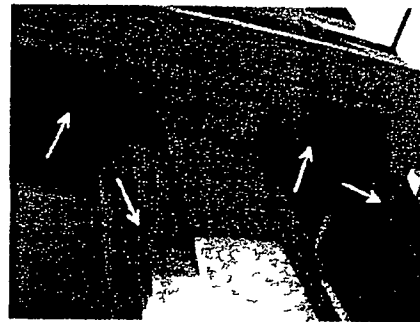
Flat accents need to be angled or caulked
Areas that were reprobred.



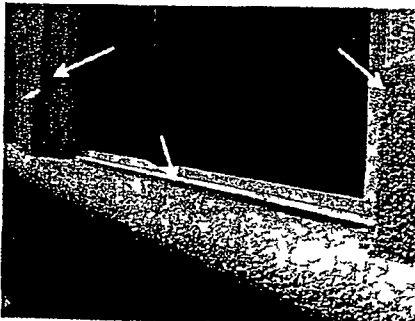
Window caulk seems to be functioning
properly



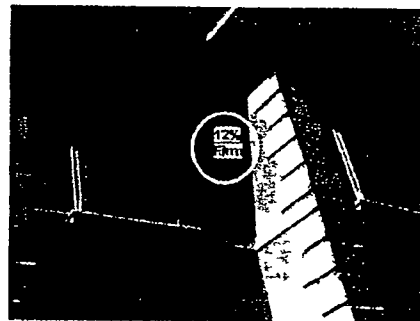
Window caulk seems to be functioning
properly



Window caulk seems to be functioning
properly



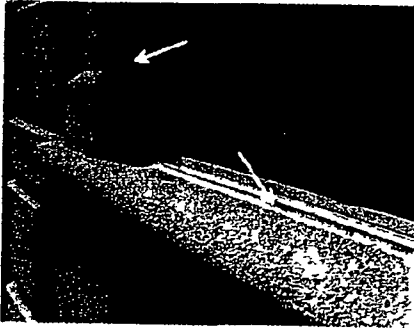
Window caulk seems to be functioning
properly



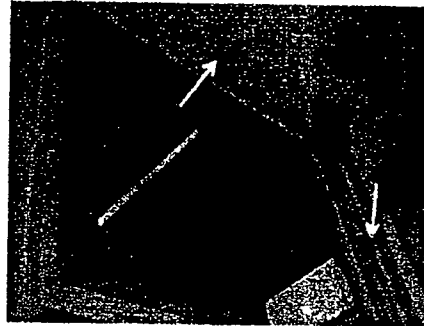
Area where reprobding was done

The Home of Fred Babae
133 Beaver Dam Rd
Columbia S C 29223

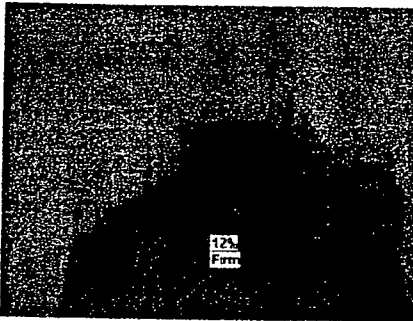
Interim Inspection Report



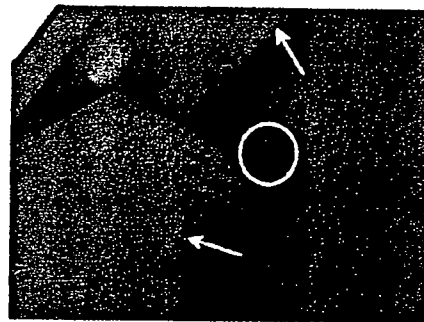
Window caulk seems to be functioning properly



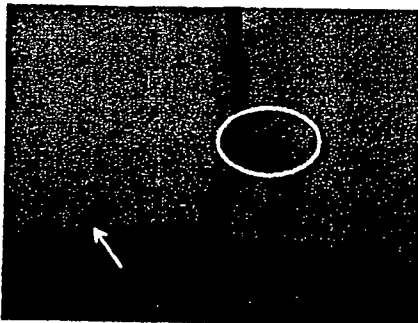
Window caulk seems to be functioning properly



Area that was reprobbed Flat accents



Kickout is installed, soffit/roof saddle is caulked



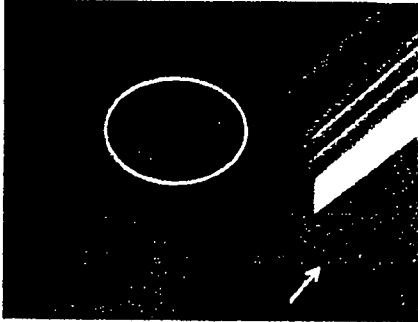
Kickout is installed Soffit/roof saddle is caulked



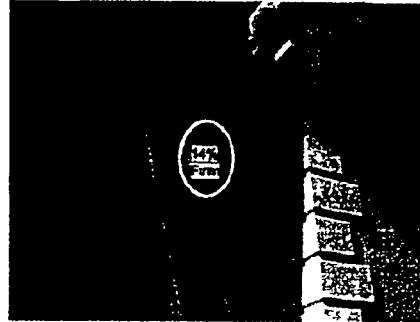
Window caulk seems to be functioning properly

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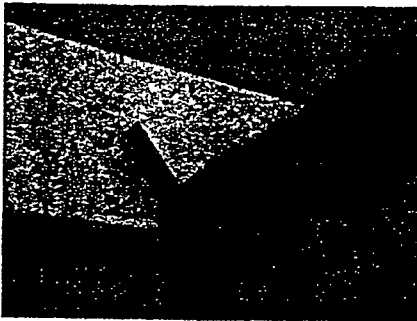
Interim Inspection Report



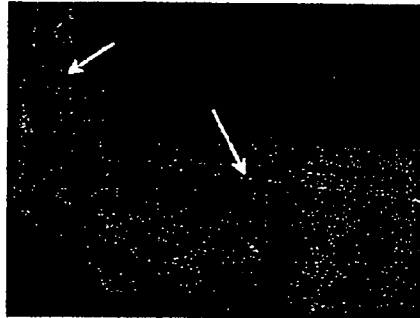
Kickout is installed Soffit/roof saddle is caulked



Area that was reprobred Flat accents



Caulk failure behind kickout Needs to be recaulked



Window caulk seems to be functioning properly



Area that was reprobred Flat accents



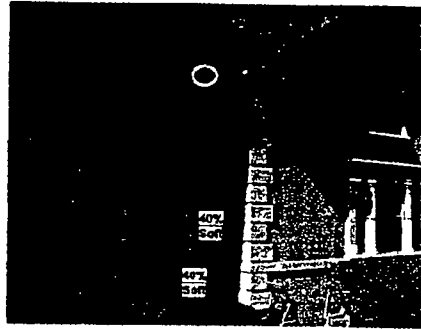
Front entrance

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133 Beaver Dam Rd
Columbia S C 29223

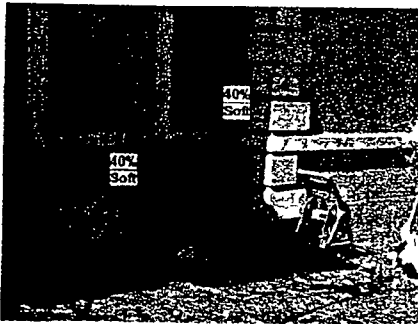
Interim Inspection Report



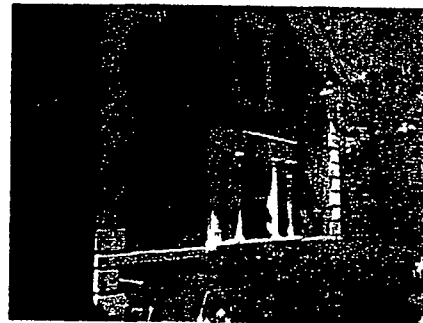
Flat accents



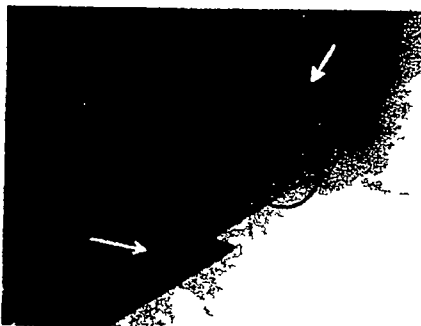
Kickout and flat accents High moisture readings Soft substrate



Area where high moisture readings were obtained



Flat accents



Window caulk seems to be functioning properly



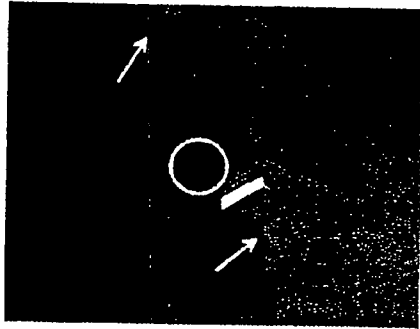
Window caulk seems to be functioning properly

The Home of Fred Babae
133 Beaver Dam Rd
Columbia S C 29223

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APP_1038

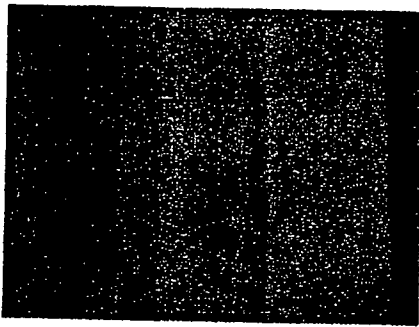
Interim Inspection Report



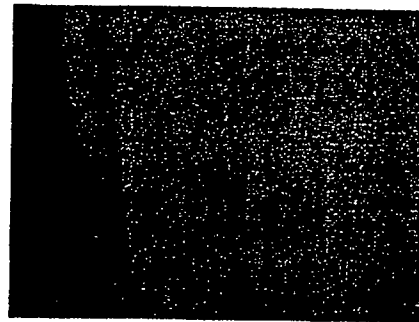
Kickout is installed Soffit/roof saddle is caulked



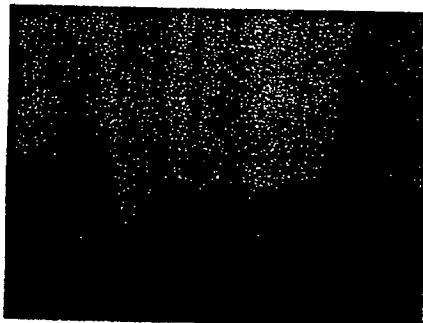
Flat accents



Caulk failure at garage frame Damaged stucco on accent band



Caulk failure at garage frame



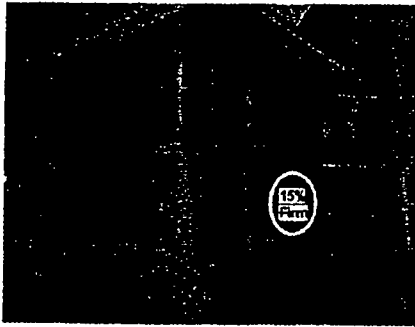
Exposed EPS and mesh at bottom of garage frame & accent



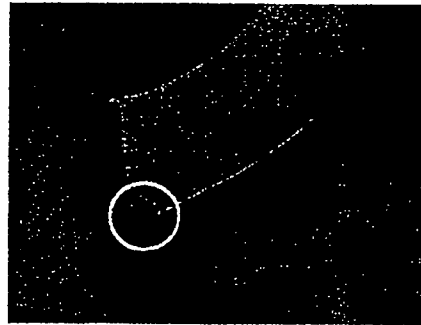
Back elevation

The Home of Fred Babaee
133 Beaver Dam Rd
Columbia S C 29223

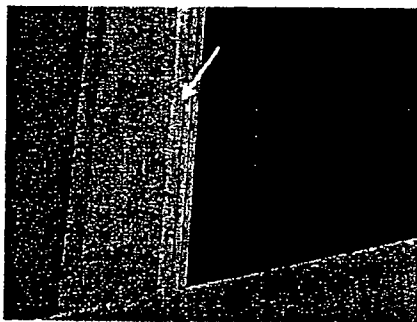
Interim Inspection Report



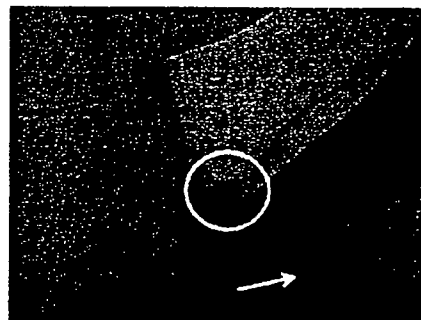
Flat accents Area that was reprobbed



Kickout flashing is installed Copper flashing



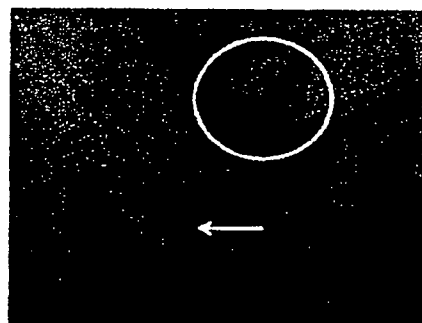
Window caulk seems to be functioning properly



Kickout flashing is installed Area under kickout is caulked



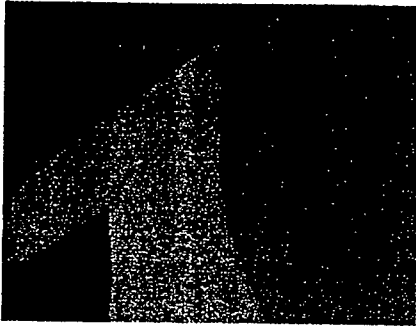
Flat accents Kickout is installed High moisture readings Substrate rot. Area that was reprobbed



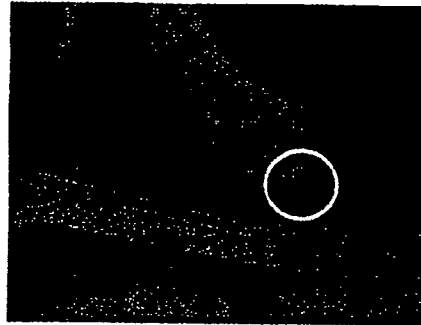
Kickout flashing is installed Area under kickout is caulked

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133 Beaver Dam Rd
Columbia S C 29223

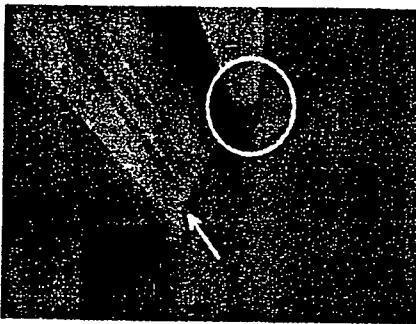
Interim Inspection Report



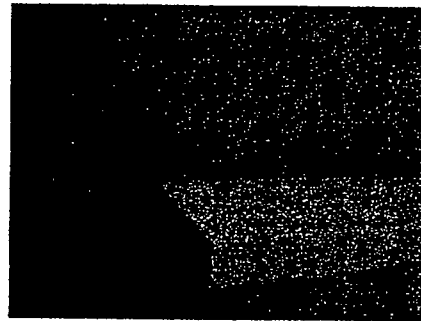
Crack & caulk failure above copper flashing at doorway



Kickout flashing is installed



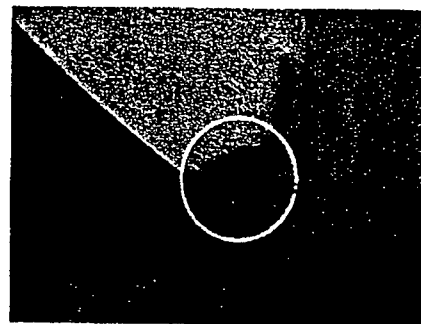
Kickout flashing is installed Area under kickout is caulked



Flat accent should be angled or caulked



Crack at window accent needs to be sealed



Kickout flashing is installed Caulk failure behind kickout at copper flashing

The Home of Fred Babaee
133 Beaver Dam Rd
Columbia S C 29223

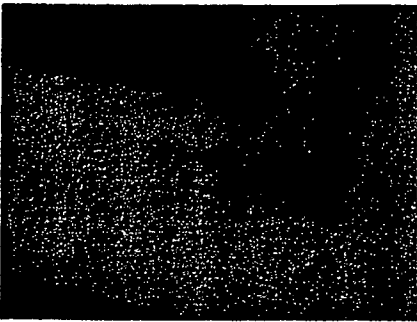
Interim Inspection Report



Crack in stucco needs to be sealed
Window caulk seems to be functioning properly Brick meets stucco is caulked



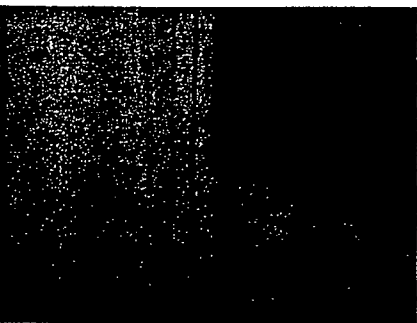
Caulk failure is present at window frame



Caulk failure is present at window frame



Flat accents



Caulk failure is present at window frame



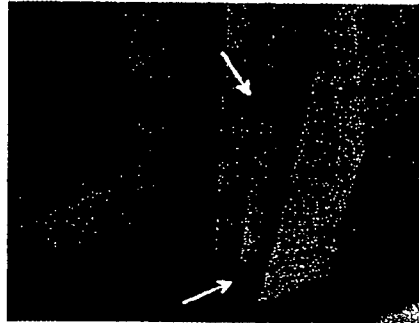
Caulk failure is present at window frame

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Columbia S C 29223

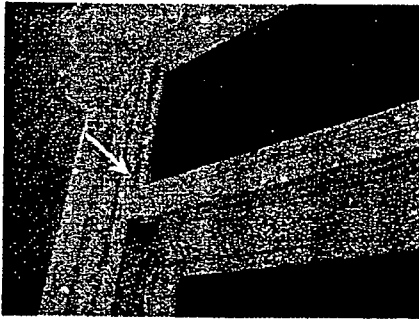
Interim Inspection Report



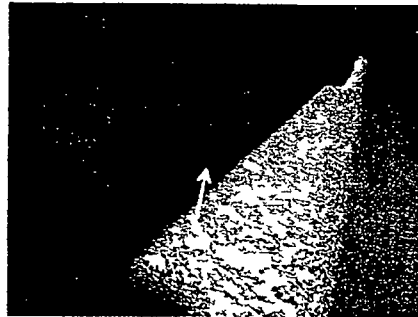
Flat accents



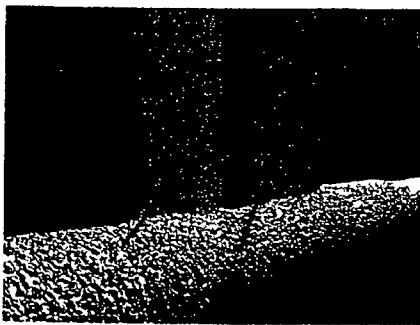
Door frame and threshold is caulked



Door frame is caulked



Window caulk seems to be functioning properly



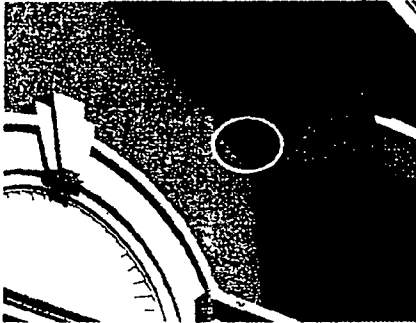
Crack in stucco at window accent needs to be sealed



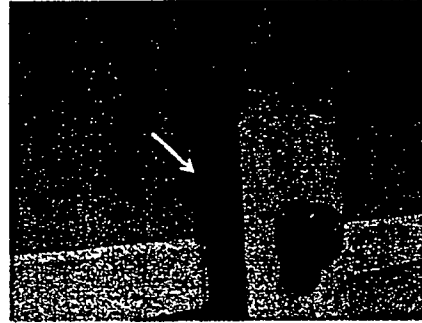
Flat accents

The Home of Fred Babae
133 Beaver Dam Rd
Columbia S C 29223

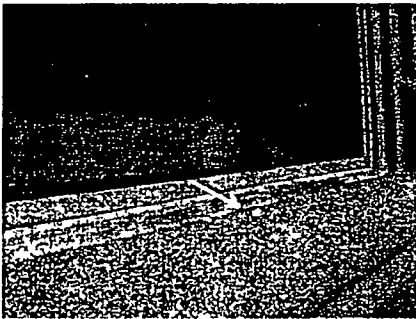
Interim Inspection Report



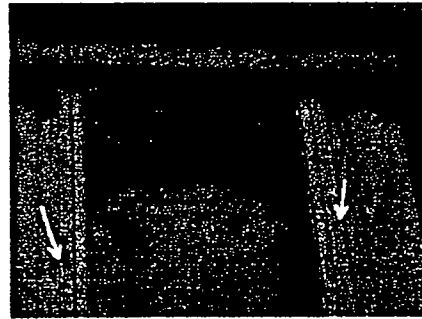
Kickout flashing is installed



Utility box location is caulked



Window caulk seems to be functioning properly



Window caulk seems to be functioning properly

The Home of Fred Babae
133 Beaver Dam Rd
Columbia S C 29223

FROM

FAX NO 18033330143

Apr 21 2006 08 35AM P1

Fariborz Z Babaei
133 Beaver Dam Rd
Columbia S C 29223
Phone 803-788-9589
Cell 803-608-2743

Re Moisture Warranty certification # 411014

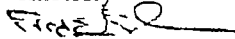
Dear Mr. Tim McClain

Enclose is the estimate from Mr. Charles Bifano to repair and replace damage stucco parts

Mr. Tim, I have spent a lot of money and time to get you as much as information possible so we can get this claim to appropriate people for reimbursement. I demand a \$20,000.00 repair fee and I will cover the rest out of my own pocket.

Please make sure that this claim goes forward properly. If you have any questions please contact me at my cell 803-608-2743.

Sincerely



Fred Z. Babaei

Dear Mr Babaee

If you feel that this action is unsatisfactory you may pursue arbitration. Details of this procedure are included in the Terms and Limitations of the MoistureFree Warranty Section II F G.

Tim McLain
800 400 8679 ext 164

MOISTURE WARRANTY CORPORATION

70306 N Ma Str 7
Columbia SC 29211
P (704) 896-0339

Wachovia
Wachovia Bank N.A.
wachovia.com
66 1/530

1740

7/31/2006

PAY TO THE
ORDER OF Fred Babae

\$ 2 500 00

Two Thousand Five Hundred and 00/100

DOLLARS

Fred Babae
133 Beaver Dam Rd
Columbia SC 29223

MEMO

JDM
J.D. Morris

⑈001740⑈ ⑈053000219⑈ 2000028821997⑈

MOISTURE WARRANTY CORPORATION

Fred Babae

Date Type Reference
07/31/2006 Bill Claim / 41101401

Original Amt
2 500 00

7/31/2006
Balance Due Discount
2 500 00
Check Amount

1740

Payment
2 500 00
2 500 00

Wachovia Checking

2 500 00

MOISTURE WARRANTY CORPORATION

Fred Babae

Date Type Reference
07/31/2006 Bill Claim / 41101411

Original Amt
2 500 00

7/31/2006
Balance Due Discount
2 500 00
Check Amount

1740

Payment
2 500 00
2 500 00

Wachovia Checking

500 00

12 PAPER CHECK

Moisture Free233

1031

APP_1047

Wood Moisture Content

This leaflet describes the practical meaning to the homeowner of readings from a wood moisture meter

The wood moisture content (WMC) of wooden members of the substructure of residences being sold in the state is routinely being disclosed in the closing process of the sale to buyers. The reading is usually provided by pest control operators and is included in or near the termite letter (form CL 100 Official South Carolina Wood Infestation Report)

The notation such as WMC 18 is usually meaning less or at the most a curiosity since seldom is there a question or interpretation of the notation. But the disclosure is highly significant

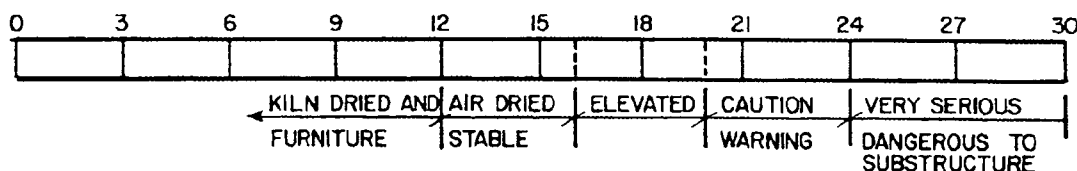
South Carolina suffers extensive moisture damage in residences across the state stemming from multiple causes. The problem is so widespread and the damage so costly to repair that pressure for disclosure of conditions has led to the reporting of substructural wood moisture content.

Following here is an interpretation of the meaning

WMC Wood Moisture Content Weight of water expressed as a percentage of oven dry weight of wood water in intermolecular regions of cell wall. Full fiber saturation (fsp) ranges from 28-31 percent depending on temperature and kind of wood.

Scale s Meanings

Below 12	Readings in this area are gathered from kiln or oven dried woods and furniture grades of wood and represent very dry conditions
12-16	Readings are common to construction grades air dried lumber and healthy residential substructures (beneath first floor in crawl spaces). These are the readings desired.
16-20	Readings indicate a possible elevated level of wood moisture. Such readings should alert the homeowner to look for a source of excess moisture in the crawl space and to be sure that foundation vents are opened for continuous year round ventilation. The excess moisture source should be corrected if found.
20-24	Readings indicate a serious problem somewhere. The excess moisture source must be immediately corrected and the situation carefully monitored until the WMC returns to the 12-16 range.
25-30	Actual and often extensive damage is evident when readings reach this level. The substructure may show decayed areas ranging from small to very large of rotten floor joist, sills and subflooring. Often this is the "too late" level of reading for correcting problem situations without repair costs in the thousands of dollars.



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, III Circuit Court Judge

Case No. 06 CP 40 7215

Fariborz Z. Babaei and Malihe Babaei

Appellants/Respondents

vs

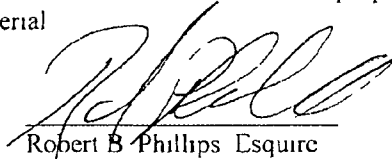
Moisture Warranty Corporation d/b/a Moisture Free Warranty and
Preferred Home Inspections, Inc.

Defendants

Of Whom Moisture Warranty Corporation d/b/a Moisture Free Warranty is Respondent/Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal complies with the Order of the Supreme Court dated August 13, 2007 and that this contains all material proposed to be included by any of the parties and not any other material.



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Attorneys for Appellants

Columbia South Carolina
July 9, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Dovet A. Early, III, Circuit Court Judge

Case No. 06-CP-40 7215

Fariborz Z. Babae and Malihe Babae

Appellants/Respondents

vs

Moisture Warranty Corporation d/b/a Moisture Free Warranty, and
Preferred Home Inspections Inc

Defendants,

Of Whom Moisture Warranty Corporation d/b/a Moisture Free Warranty is Respondent/Appellant

BRIEF OF APPELLANTS

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ATTORNEY FOR APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR DIRECTED VERDICT AS TO PLAINTIFFS' CAUSES OF ACTION FOR A VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT BECAUSE THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO CREATE A QUESTION OF FACT AS TO WHETHER A WARRANTY THAT "GUARANTEES" A DRY HOUSE, BUT ACTUALLY PERMITS MOISTURE LEVEL THAT EXCEED THE AMOUNT PERMISSIBLE BY APPLICABLE STANDARDS WAS DECEPTIVE
- II WHETHER THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL *NECESSARIMITTUR* BECAUSE THE JURY'S DETERMINATION OF DAMAGES WAS NOT EXCESSIVE, THERE WAS NO REASON TO IMPOSE THE WARRANTY TO LIMIT DAMAGES, AND THE DAMAGES SHOULD NOT HAVE BEEN CONSTRUED TO BE ACTUAL INSTEAD OF CONSEQUENTIAL

STATEMENT OF THE CASE

On December 5, 2006, Plaintiffs Furiboriz and Malihe Babae (hereinafter 'the Babaees' or Appellants) brought suit against Defendants Moisture Warranty Corporation d/b/a Moisture Free Warranty (hereinafter 'Moisture Free' 'Defendant' or 'Respondent') and Preferred Home Inspections, Inc. in the Richland County Court of Common Pleas alleging causes of action for: (1) fraud (2) constructive fraud (3) negligence and negligent supervision (4) negligent misrepresentation (5) breach of express warranty and (6) violation of South Carolina's Unfair Trade Practices Act arising from their purchase of a Moisture Free Warranty on November 18, 2004. The Warranty purported to guarantee that the Babaees' synthetic stucco (a.k.a. EIFS) home was and would remain 'dry' for the term of the Warranty.¹ The Babaees also brought causes of action against Moisture Free, the entity who issued the Moisture Free Warranty, for breach of contract, breach of contract accompanied by a fraudulent act, and breach of the implied covenants of good faith and fair dealing.

Moisture Free moved to compel arbitration of the Babaees' suit on February 1, 2007 based on 'the express terms of the Moisture Free Warranty'. Attached to the Motion was a fifteen (15) page booklet entitled "The Terms and Limitations of the Moisture Free Warranty" (hereinafter 'Terms and Limitations Booklet' or 'Booklet') that was published in February of 2006.⁴ The Babaees challenged Moisture Free's motion on the grounds, inter alia, they had not received the

¹ R pp. 18-20

R pp. 16-34

R pp. 41-59

⁴ R pp. 45-59 R pp. 62-63

Terms and Limitations Booklet prior to their purchase of the Moisture Free Warranty. The Honorable G. Thomas Cooper Jr. heard the motion on July 31, 2007, and held that Moisture Free failed to produce competent evidence that [the Babaees] entered into, or even were aware of, an arbitration agreement when they purchased the Moisture Free Warranty.⁵ Specifically, Judge Cooper determined the Babaees only received Moisture Free's "advertising and marketing materials" prior to executing the contract; he found no evidence that the Babaees received the Terms and Limitations Booklet prior to their purchase of the warranted property.⁶ The advertising and marketing materials the court referenced consisted of a ten (10) page brochure that contained color pictures and text that set forth the terms & conditions of the Moisture Free Warranty (hereinafter "Brochure").⁷ The Brochure made no mention of an arbitration requirement.⁸ Finding that the Brochure formed the basis of a contract between the Babaees and Moisture Free, Judge Cooper denied the motion to compel arbitration based on the Terms and Limitations Booklet "[b]ecause South Carolina law does not permit the unilateral modification of the terms of a contract *after* a contract has been executed."⁹ Litigation followed and the case was ultimately tried to a jury before the Honorable Doyet A. Early III in the Richland County Court of Common Pleas on November 17, 20, 2008.

After presenting their case in chief, the Babaees withdrew all of their claims except for the

⁵ R. p. 4.

⁶ R. pp. 4-5.

⁷ R. pp. 920-30.

⁸ Id.

⁹ R. p. 5.

breach of warranty, fraud, and breach of the South Carolina Unfair Trade Practices Act claims.¹⁰ After hearing from the parties,¹¹ Judge Early dismissed the Babaees' causes of action for fraud and violation of the South Carolina Unfair Trade Practices Act (SCUTPA).¹² The trial proceeded on the Plaintiffs' remaining cause of action for breach of warranty and the Jury returned a general verdict in the amount of \$140,000.00 for the Plaintiffs.¹³ Judge Early granted Moisture Free Warranty ten (10) days to file its post trial motions.¹⁴ The post trial motions were heard on January 21, 2009 in Aiken. By Order filed and/or mailed on February 25, 2009, Judge Early granted Moisture Free's motion for a new trial *nisi remittitur* on the grounds that "the amount of the verdict [was] merely excessive."¹⁵ The court reasoned that the verdict was "in excess of any actual damages recoverable under the express terms of the warranty" and that the Plaintiff's expert, Chris Cooper, testified regarding costs wholly unrelated and not covered by the warranty.¹⁶ In support of its ruling, the court quoted from the Terms and Limitation Booklet that limited Moisture Free's "total aggregate liability of this Limited Warranty" to \$20,000 per year.¹⁷ The Booklet was the same document Judge Cooper found the Plaintiffs did not receive until after they formed a contract with

¹⁰ R. p. 802, line 14-20.

¹¹ R. p. 802, line 18 - p. 813, line 15 (argument of plaintiffs' counsel).

¹² R. p. 813, lines 16-23 (argument of plaintiffs' counsel).

¹³ R. p. 12, R. p. 869, lines 2-15.

¹⁴ R. p. 870, lines 9-20.

¹⁵ R. p. 9.

¹⁶ R. p. 10.

¹⁷ *Id.*

Moisture Free.¹⁵ Plaintiffs' counsel received a copy of Judge Early's post-trial order on February 27, 2009 and filed its Notice of Appeal on March 2, 2009.¹⁹

Facts

Plaintiffs purchased a home from Giuseppe and Maria Maoli on November 18, 2004. The home's exterior is clad with a type of synthetic stucco known as an Exterior Insulation Finish System or by its acronym EIFS.²⁰ EIFS is a multi-layer system that is attached to a home's wooden structure and looks like traditional stucco.¹ Unlike other types of exterior cladding (i.e. brick, hard coat-stucco, etc.), EIFS traps moisture behind it where it can damage a home's wooden structure.²¹ This propensity to cause moisture damage led to the product being banned from use on wood-framed residential construction.²

Before purchasing their home, the Babaces retained a local contractor and EIFS expert, Frank Clark of CK Services, Inc.²⁴ CK Services did two inspections for the Babaces. The first was a visual inspection of the entire property that identified repair and maintenance items in the home's interior, crawlspace, and lawn.³ The Babaces have since repaired most of those items at a cost of nearly

¹⁵ R. pp. 4-5.

¹⁷ R. p. 124.

²⁰ R. p. 150, lines 15-17.

¹ R. p. 159, lines 8-17 (testimony of Bill Flaherty).

²² R. p. 159, line 22; p. 160, line 11 (testimony of Bill Flaherty).

²³ R. p. 863, line 21; p. 865, line 10 (testimony of Ron McClure); R. p. 599, line 1; p. 600, line 2 (testimony of Chris Burton).

²⁴ R. n. 434, lines 13-14 (testimony of Fabrizio Z. Babace).

²⁵ R. p. 435, line 8; p. 436, line 22 (testimony of Fabrizio Z. Babace); R. pp. 935-939.

170 000 00.⁶ The second CK Services inspection pertained to the EIFS. CK determined that certain pieces of the EIFS had not been installed in accordance with manufacturers' recommendations and recommended that test cuts be made into the EIFS to determine if the home suffered from moisture damage behind the EIFS but the Maolis would not allow such testing to occur.²⁷ At that point, the Babaees decided to walk away from purchasing the house.²⁸ However, the Maolis convinced the Babaees to reconsider the purchase by telling them the home had a Moisture Free Warranty that would protect it from moisture intrusion and keep the house dry for as long as they owned it.²⁹ To help convince the Babaees that their home would be protected from moisture damage by the Moisture Free Warranty, the Maolis gave the Babaees a Brochure outlining the terms and conditions of the Moisture Free Warranty.³⁰ The Brochure claimed Moisture Free's mission was "to protect stucco homes from moisture intrusion through a "process of inspecting, repairing, and protecting" a stucco home."³¹ It further explained that Moisture Free "know[s] what steps to take to assure homeowners that their home is dry, and we guarantee their home will remain dry during the term of the warranty... or we'll pay to get it dry." The Brochure also set out in detail Moisture Free's

⁶ R p 437 line 2 - p 438 line 4

²⁷ R p 438 line 8 - p 443 line 6 (testimony of Fariborz Z. Babae) R p 901-19 (CK Services Inspection)

²⁸ R p 443 lines 8-11 (testimony of Fariborz Z. Babae)

²⁹ R p 443 lines 12-25 (testimony of Fariborz Z. Babae)

³⁰ R p 443 line 12 - p 444 line 5 - p 432 line 11 - p 433 line 9 (testimony of Fariborz Z. Babae) R p 920-30

³¹ R pp 921, 924

² R p 924 (punctuation in original)

process for issuing a warranty

Three Easy Steps to a MoistureFree Warranty

A three step process must take place before a MoistureFree Warranty is issued

Inspection

Have the home inspected using the MoistureFree Inspection Protocol or by calling us

Review and Recommendations

The inspection is reviewed by one of our Warranty Specialists. If repairs are necessary to meet warranty requirements, we are available to guide you through the repair process. If repairs are required, an inspector must visit the home and verify the repairs have been made effectively and according to MoistureFree Warranty standards.

Warranty Issued

Moisture Warranty Corporation issues a Warranty Authorization Certificate that warrants the home is dry and will remain dry during the term of the warranty, or we will pay to get it dry, based on the terms of the warranty.³³

The Brochure also claims the Moisture Free Warranty was selected by the nation's largest EIFS manufacturer, Dryvit Systems Inc., to be provided to its customers as part of a class action settlement. The Brochure then claims purchasers of the Moisture Free Warranty can get peace of mind in knowing that they have the same protection the largest stucco manufacturer is providing for its homeowners nationwide.³⁴

Mr. Babace testified that he relied on the Brochure in making his decision to purchase his home. When asked about the significance of Brochure, Mr. Babace explained that

³³ R. n. 925 (emphasis in original)

³⁴ R. p. 926

I own a company as well. My mission statement – The first line of my website explains who we are, what we do, what type of organization we are. A lot of our customers sign up with us because of our mission statement and we stand behind our mission statement because it's something that you have to prove as a business owner.⁵

Mr. Babace went on to explain that when I saw the mission statement, I felt honestly that this is a product we need on this house, you know, to keep our house dry.⁶ Mr. and Mrs. Babace both studied the Brochure and found that its contents "proves to us that [Moisture Free] we'll [sic] make sure your house is dry or [Moisture Free] we'll [sic] pay to keep it dry." Mr. Babace went on to testify that he did not receive any other terms and conditions regarding the Moisture Free Warranty prior to his purchase of the home and Warranty on November 18, 2004.⁷

In January of 2005, Mr. Babace received an Authorization Certificate from Moisture Free stating there was an exclusion on his home due to excess moisture that was discovered by an inspector for Moisture Free. When Mr. Babace inquired about the exclusion, Moisture Free removed it without making any repairs to the home.⁸ During yet another inspection of his home by Moisture Free, Mr. Babace became concerned about the performance of Moisture Free because no repairs had been performed to address the moisture problem identified by the exclusion.⁹ Shortly thereafter, Mr. Babace noticed a dark stain on the outside of his home which he then reported to Moisture

⁵ R p 444 line 18-25 (testimony of Fairbairn Z. Babace)

⁶ R p 445 line 3-7 (testimony of Fairbairn Z. Babace)

⁷ R p 452 line 21 – p 453 line 23 (testimony of Fairbairn Z. Babace)

⁸ Id.

⁹ R p 454 line 7-25 (testimony of Fairbairn Z. Babace)

Free.⁴⁰ Moisture Free sent a North Carolina contractor named Frank Guidera to inspect the Babace home.⁴¹ Mr. Guidera produced an estimate that indicated it could require nearly \$10,000 to address moisture problems with the Babace home.⁴² When Mr. Babace followed up with Moisture Free regarding Mr. Guidera's report, he was offered \$750 to settle his claim and was provided, for the first time, a copy of the Terms and Limitations Booklet.⁴³ Moisture Free has relied on a version of that Booklet to support both its motion to compel arbitration and its motion for a new trial *in remittitur*.

Moisture Free is a North Carolina company that provides its warranty products to both individual homeowners and members of a class action settlement reached by the largest domestic supplier of EIFS products, Dryvit Systems, Inc.⁴⁴ At trial, the Plaintiffs demonstrated that the Babace's experience with Moisture Free is typical of how the company does business in South Carolina.⁴⁵ First, a warranty is purchased for home, and then the terms and conditions booklet is delivered to the homeowner. There is no evidence in the record that a specific version of the Moisture Free Warranty was ever delivered to the Plaintiffs prior to their purchase of the home, yet Moisture Free warranty repeatedly represented that it had been. During the Plaintiffs' case, Moisture Free's counsel represented to the Court that "[c]ontrary to what Mr. Babace told you, the realtor [for

⁴⁰ R p 444 line 5-24 (testimony of Fairboiz Z. Babace)

⁴¹ R p 456 line 1-16 (testimony of Fairboiz Z. Babace)

⁴² Id.

⁴³ R p 460 lines 4-24 (testimony of Fairboiz Z. Babace)

⁴⁴ R p 557 line 17 p 559 line 3 p 609 lines 3-8 (testimony of Chris Burton)

⁴⁵ R p 154 line 21 p 156 line 2 p 184 lines 9-21 (testimony of Bill Flaherty)

the Babaees purchase] is going to say he knew exactly what was the terms of his warranty.⁴⁶ In fact, the evidence presented at trial proved otherwise.

During the purchase of the Babaees' home, a realtor named Carl "Buddy" Lewis of Russell & McElfloat Realtors represented both the buyers and the sellers.⁴⁷ Moisture Free admitted that it had many business dealings with Mr. Lewis regarding the sale of EIFS homes.⁴⁸ Mr. Lewis testified several times that he did not provide the terms and conditions booklet to the Babaees.⁴⁹ Mr. Lewis explained that Moisture Free issues its warranties just like a termite company issues its termite bonds—the warranty is just like on a termite bond; the check goes to the warranty company, and then the bond comes back.⁵⁰ The importance of this testimony was not lost on the court, who interjected a question of the witness regarding what material Mr. Lewis provided the Babaees. He responded that "[t]he only thing I gave with regard to the moisture warranty was this piece of paper (one page authorization certificate for the warranty)."⁵¹

Once the Babaees received the terms and conditions Booklet, they learned that the Moisture Free Warranty would not in fact pay to have their home repaired to a point where it was "dry." Moisture in the wood used to build homes is measured on a scale of 1% to 30%.⁵² Clemson

⁴⁶ R p 410 lines 20-22

⁴⁷ R p 762 lines 14-18; p 782 lines 3-5 (testimony of Carl "Buddy" Lewis)

⁴⁸ R p 583 lines 22-24 (testimony of Chris Burton)

⁴⁹ R p 509 lines 1-16 (testimony of Carl "Buddy" Lewis)

⁵⁰ R p 771 lines 2-24 (testimony of Carl "Buddy" Lewis)

⁵¹ R p 771 lines 20-21 (testimony of Carl "Buddy" Lewis)

⁵² R p 888 (Residential Housing Bulletin entitled Wood Moisture Content, published by Clemson Extension)

Extension has set forth guidelines regarding wood moisture content that was introduced during the trial of this matter. According to Clemson, a wood moisture content (WMC) of 20% to 24% indicate[s] a serious problem somewhere. The excess moisture source must be immediately corrected and the situation carefully monitored until the WMC returns to the 12[%] to 16[%] range.⁵⁴ The Babaees did not learn until after their purchase of their EIFS home that the Moisture Free Warranty does not provide for any action until the WMC reaches 25%.⁵⁵ Plaintiffs' expert Bill Flaherty testified to the applicability of the Clemson standard in the EIFS industry and confirmed that a WMC of 20 to 24 percent is indicative of a significant problem based on the Clemson and other recognized standards applicable to the building industry.⁵⁶ Mr. Flaherty, who has performed several protocol inspection for Moisture Free in the past, also testified that the 25% moisture standard that Moisture Free represented to the Babaees was much higher than the 20% standard Moisture Free offered to the Dryvit class action settlement that Moisture Free touted in the Brochure that was provided to the Babaees.⁵⁷ In fact, Mr. Flaherty testified that Moisture Free did not follow its inspection protocols and made no repairs to the Moisture Free Warranty standards at the Babaees home.⁵⁸

⁵³ Id.

⁵⁴ Id.

⁵⁵ R. pp. 888 (Clemson Extension Bulletin - Wood Moisture Content) and 162, line 22, p. 163, line 4 (testimony of Bill Flaherty).

⁵⁶ R. p. 160, line 24, p. 161, line 4, p. 161, line 5, p. 163, line 4 (testimony of Bill Flaherty).

⁵⁷ R. p. 161, line 22, p. 163, line 19 (testimony of Bill Flaherty).

⁵⁸ R. p. 159, line 22, p. 160, line 11, p. 167, lines 11-16, p. 164, line 11 to p. 165, line 5, p. 187, line 11 - p. 188, line 17 (testimony of Bill Flaherty).

The Plaintiffs introduced evidence at trial that EIFS can not be repaired and that the only way to ensure a dry home in South Carolina is to remove the EIFS and replace it with another type of siding. Contractor Chris E. Cooper was qualified as an expert repairing EIFS systems.⁵⁹ Mr. Cooper is a residential and commercial builder who began applying EIFS to homes in 1988.⁶⁰ When moisture damage problems were identified with EIFS homes in the mid 1990s, Mr. Cooper was part of an EIFS industry effort to determine how those homes may be repaired.⁶¹ Although Mr. Cooper patented a type of flashing known as a pan flashing to help repair EIFS homes, he ultimately came to the opinion that repairs are ineffective.⁶² Mr. Cooper explained that EIFS repairs attempt to take a system which is now outlawed and banned and trying to patch it up or bandaid it to stop water from getting in behind it which is what we did [as part of the EIFS industry effort] but water still got behind because it was failure to begin with and it was a failure to try and repair and it didn't work.⁶³ Mr. Cooper explained that the failure of EIFS repairs now makes it cost prohibitive for his company to get liability insurance for EIFS repair work.⁶⁴ He further opined that the Babae home could not be repaired because repair techniques in general are inferior to the original

⁵⁹ R p 307 line 17 - p 308 line 3 - p 310 line 17 - p 315 line 18 (testimony of Chris Cooper)

⁶⁰ R p 307 line 17 - p 308 line 24 (testimony of Chris Cooper)

⁶¹ R p 307 line 17 - p 308 line 24 (testimony of Chris Cooper) R p 863 line 21 - p 865 line 10 (testimony of Ron McClure)

⁶² R p 312 line 7 - p 313 line 11 - p 344 lines 18-22 (testimony of Chris Cooper)

⁶³ R p 309 lines 6-11 (testimony of Chris Cooper)

⁶⁴ R p 335 line 10 - p 337 line 12 (testimony of Chris Cooper)

application work and the work contemplated by Moisture Free are just as ineffective⁶⁵

Mr. Cooper produced a detailed estimate of \$201,416 to remove the EIFS and replace it with hardco stucco on the Babace's home.⁶⁶ Mr. Cooper further estimated that the cost of repairing the moisture damage to the home's wooden structure behind the EIFS was approximately \$16,000, but that the figure may be low because the cost of repairing underlying moisture damage usually runs between ten to twenty percent of the cost of replacing the EIFS.⁶⁷ Mr. Babace also testified that he believed the value of his home was diminished by \$220,000 due to its EIFS exterior.⁶⁸

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR DIRECTED VERDICT AS TO PLAINTIFFS' CAUSES OF ACTION FOR A VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT BECAUSE THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO CREATE A QUESTION OF FACT AS TO WHETHER A WARRANTY THAT "GUARANTEES" A DRY HOUSE, BUT ACTUALLY PERMITS MOISTURE LEVEL THAT EXCEED THE AMOUNT PERMISSIBLE BY APPLICABLE STANDARDS WAS DECEPTIVE.

Standard of Review

When reviewing in order granting a directed verdict, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party against who the verdict was directed. A jury issue exists where the evidence is susceptible of more than one reasonable inference. *Botchie v. O'Dowd*, 318 S.C. 130, 456 S.E.2d 403 (1995); *Welch v. Epstein*, 342 S.C. 279, S.E.2d 408 (Ct. App. 2000). In reviewing a directed verdict, the appellate court must determine

⁶⁵ R p 336 line 8 p 337 line 22 (testimony of Chris Cooper)

⁶⁶ R p 325 line 20 p 328 line 24 (testimony of Chris Cooper)

⁶⁷ R p 325 line 20 p 327 line 19 (testimony of Chris Cooper) R pp 889-95

⁶⁸ R p 867 line 15 p 868 line 16 (testimony of Fred Babace)

whether a verdict for the party opposing the motion would have been reasonably possible under the facts.

A trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. *Welch v. Epstein*, 342 S.C. 279, 50 S.E.2d 408 (Ct. App. 2000). The appellate court will reverse the trial court when there is no evidence to support the ruling or the ruling amounts to an error of law. *Cicech v. South Carolina Wildlife & Marine Resources Dept.*, 328 S.C. 24, 491 S.E.2d 571 (1997). When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Retland v. Southland Equip. Serv. Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998).

Defendant Moisture Warranty Corporation moved for directed verdict as to the Babaees claim that Moisture Free violated the South Carolina Unfair Trade Practices Act (SCUTPA), S.C. Code Ann. §39-5-10 *et seq.* which the Trial Court granted.⁶⁹

A. Ample Evidence Existed to Submit Plaintiffs' SCUTPA Claim to the Jury

In reviewing a directed verdict motion, the appellate court must view the evidence and all reasonable inferences from the evidence in the light most favorable to the party opposing the motion. Furthermore, if the evidence is susceptible of more than one reasonable inference, the trial court should deny the motion for directed verdict and case should be submitted to the jury. *Scoggins v. McCallion*, 321 S.C. 264, 468 S.E.2d 12, 14 (Ct. App. 1996).

In the present case, there was ample evidence to warrant the submission of the Babaees Unfair Trade Practices claim to the jury. The Brochure the Babaees received set forth a procedure that Moisture Free was to follow to inspect and repair a home to ensure it was 'dry' prior to the

⁶⁹ R p 813 Lines 21-23

...ance of a Warranty.⁷⁰ Once the Warranty was in place, Moisture Free represented that it would pay to keep the home dry during the term of the warranty. Not only was the home not properly inspected and repaired by Moisture Free prior to the Babaees' purchase of the home, Moisture Free took no action to address an identified area of moisture that was the subject of its own exclusion.⁷¹ It was not until the Babaees had lived in their home and inquired about moisture problems that they learned Moisture Free's definition of "dry" exceeded most moisture standards that are applicable to HHS homes. The Babaees eventually filed a lawsuit after not getting an acceptable response from Moisture Free Warranty about the issues with their house.⁷² Despite evidence that Moisture Free's guarantee of a dry home was deceptive, the trial judge granted the Defendant's motion for a directed verdict on the issues of fraud and unfair trade practices.⁷³

A directed verdict on the SCUTPA claim would indicate that the representations in the brochure were mere puffing and therefore, the brochure holds no legal significance. However, the focus of SCUTPA is on capability of repetition. *Noack Enter. Inc. v. Country Corners Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 480, 351 S.E.2d 347, 351 (Ct. App. 1986) (indicating that complaint must allege possible recurrence). While the trial judge said that this conduct did not rise to the level of the South Carolina Unfair Trade Practices Act, the fact that Plaintiffs alleged the

⁷⁰ R p 445 line 19 p 446 line 2 (testimony of Laurborz Z. Babae)

⁷¹ R p 453 lines 1-14 (testimony of Laurborz Z. Babae)

⁷² R p 462 lines 10-18 (testimony of Laurborz Z. Babae), R p 160 line 24 p 161 line 4 (testimony of Bill Fishery)

⁷³ R p 465 lines 22-25 (testimony of Laurborz Z. Babae)

⁷⁴ R p 813 lines 21-22

potential for repetition in their complaint is sufficient. And if there is the potential for repetition when the requirement of affecting the public interest has been met. *Williams Garrett v Murphy*, 106 F. Supp. 2d 834, 845 (D.S.C. 2000). Testimony of the realtor Buddy Lewis emphasized the potential for repetition and showed that realtors depend on Moisture Free Warranties to be protected when selling houses.

B. Plaintiffs Can Make a SCUTPA Claim Against Moisture Free as a Matter of Law

The South Carolina Unfair Trade Practice Act (SCUTPA) provides for an individual cause of action for “any person who suffers any ascertainable loss of money or property, real or personal, as a result of . . . an unfair or deceptive method, act, or practice.” S.C. Code Ann. § 39-5-140(a) (2009). Under the UTPA, a plaintiff does not need to prove the elements of fraud. 28 S.C. Juris *Unfair Trade Practices Act* § 3 (1998) (citing *Young v. Century Lincoln Mercury Inc.*, 302 S.C. 320, 396 S.E.2d 105 (Ct. App. 1989)). In fact, there need be no *intention* to deceive with a violation of UTPA; only the *capacity* to deceive is required. *Id.*

To be actionable under the UTPA, the unfair or deceptive practice must have an impact upon the public interest [meaning that] the act or practice has the potential for repetition. *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 270, 536 S.E.2d 399, 407 (Ct. App. 2000) (quoting *Halcyon Nursery Co. v. Forrest*, 298 S.C. 520, 381 S.F.2d 906 (1989)). There are two general ways to demonstrate the potential for repetition: (1) by showing the same kind of actions occurred in the past, thus making it likely the actions will continue absent some deterrence, or (2) by showing the company’s procedures create a potential for repetition of the unfair and deceptive acts. *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 270, 536 S.E.2d 399, 407 (Ct. App. 2000) (citing *Crary v*

⁷ R p 811 line 20 p 812 line 17

Djibuti 329 S.C. 385, 496 S.E.2d 21 (1998)). These are not the only means of showing the potential for repetition, however, and each case must be evaluated on its own merits. *deBondt v. Cashion Motors, Inc.* 342 S.C. 254, 270, 536 S.E.2d 399, 407 (Ct. App. 2000) (citing *Daisy Outdoor Adver. Co. v. Abbott* 322 S.C. 489, 473 S.E.2d 47, 51 (1996)).

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL *NISI RE MITTITUR* BECAUSE THE JURY'S DETERMINATION OF DAMAGES WAS NOT EXCESSIVE. THERE WAS NO REASON TO IMPOSE THE WARRANTY TO LIMIT DAMAGES, AND THE DAMAGES SHOULD NOT HAVE BEEN CONSTRUED TO BE ACTUAL INSTEAD OF CONSEQUENTIAL.

Standard of Review

The power to grant a motion for a new trial motion lies within the sound discretion of the trial judge and that decision will not be disturbed on appeal unless the decision is wholly unsupported by the evidence or otherwise controlled by error of law. *Vinson v. Hartley* 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996), *Boozel v. Boozel* 300 S.C. 282, 387 S.E.2d 674 (Ct. App. 1988). In deciding whether to assess error to a court's denial of a motion for a new trial, the reviewing court must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Vinson* 324 S.C. 389, 477 S.E.2d 715. The trial court's power is not without limit, as this Court made clear in *Sullivan v. Davis*, the "exercise of such discretion [] is not absolute and it is the duty of this Court in a proper case to review and determine whether there has been an abuse of discretion amounting to an error of law." 317 S.C. 462, 467, 454 S.F.2d 907, 911 (Ct. App. 1995).

When the jury's verdict is inadequate or excessive, the trial judge has the discretionary power to grant a new trial *nisi*. *Bailey v. Peacock* 318 S.C. 13, 455 S.E.2d 690 (1995). Compelling reasons, however, must be given to justify invading the jury's province in this manner. *Id.*

Following the trial Defendants filed a post trial motion seeking *inter alia* a new trial *mis*
trinitur which was granted by Judge Early on February 16, 2009.⁷⁶ In doing so Judge Early
overruled Judge Cooper's earlier ruling denying Defendant's motion to compel arbitration based on
the Terms and Limitation Booklet.⁷⁷ Counsel argued that it was error to use the Booklet when no
evidence had been produced that it was ever received by the Plaintiffs.

Despite Judge Cooper's earlier ruling Moisture Free's counsel represented that the Terms
and Limitation Booklet was in evidence.⁷⁸ Counsel for the Babaees reminded the trial court of Judge
Cooper's earlier ruling that the Babaees did not receive the Booklet until after the purchase.
Moisture Free's counsel responded that "[c]ontary to what Mr. Babae told you, the realtor is going
to say he knew exactly what was the terms of the warranty."⁷⁹ Counsel for the Babaees had to
correct this misrepresentation to the court and of course the realtor Buddy Lewis testified that the
Booklet is mailed after the fact to the purchaser.⁸⁰ Without any additional evidence, Moisture Free's
counsel repeatedly raised the Booklet during the Plaintiff's case as if its delivery was a decided fact.⁸¹
After repeated sparring over the delivery of the Booklet the court put an end to the issue during the
Plaintiff's case.

⁷⁶ R pp 7 & 9

⁷⁷ R pp 2 & 5

⁷⁸ R p 406 line 22 - p 408 line 19 (argument of counsel)

⁷⁹ R p 410 lines 20-22 (argument of counsel)

⁸⁰ R p 419 lines 19-24 (argument of counsel) R p 771 lines 2-24 (testimony of Carl
Buddy Lewis)

⁸¹ R p 543 line 11 - p 545 line 14 (argument of counsel)

Moisture Free Counsel ⁸⁷ So Your Honor we did raise this issue

The Court Any you got ruled against

Moisture Free Counsel Yes but we did

The Court What else I can't help that he ruled against you

Moisture Free Counsel Yea

The Court this issue has been decided by Judge Cooper in his order I deem it irrelevant in the trial of this case and move forward ⁸³

Plaintiffs counsel tried to follow up on this issue to develop the record but was instructed that the issue had been decided and that he would not hear from either party further ⁸⁴ During its case Moisture Free introduced no evidence that the Babaees received the Terms and Imitations Booklet prior to the purchase of the Moisture Free Warranty

The Plaintiffs proposed a jury charge that included the holding that a unilateral modification of a contract after it has been entered into is improper after the sale as well as a holding that a home with LHS must be stripped to find the damage ⁸⁵ The judge rejected these proposed charges ⁸⁶ Plaintiffs then entered the proposed charge as an exhibit ⁸⁷ The judge used the Defendant's proposed

⁸³ Transcript erroneously identifies the speaker as 'The Court' R p 547 line 9

⁸⁴ R p 547 lines 9-17 (argument of counsel)

⁸⁵ R p 547 line 20 - p 548 line 13 (argument of counsel)

⁸⁶ R p 815 line 3-p 816 line 4

⁸⁷ R p 816 lines 5-7

⁸⁸ R p 816 lines 8-14

jury charges.⁸⁵ However, the Defendant made a motion that the charges be based on the warranty damages and limited to the terms of the warranty.⁸⁶

A. The Court Erred in Finding the Jury's Determination of Damages was Excessive

The trial court erred in granting Defendant's motion for a new trial *nisi remittitur* because the jury's verdict was not shown to be excessive. While a trial court can grant a motion for new trial *nisi remittitur* when the court believes the verdict is "merely excessive," the "jury's determination of damages is entitled to substantial deference." Welch v. Epstein, 342 S.C. 279, 303, 536 S.E.2d 405, 420 (S.C. Ct. App. 2000). At trial, Plaintiff's expert, Chris Cooper, testified that damages would be \$201,415, plus \$16,000, plus an unknown amount for damages that had not yet been discovered.⁸⁷ Similarly, Mr. Babace opined a like diminution in value of the house; he believed that the home's value was \$220,000 or \$230,000 less than the amount he paid for the house.⁸⁸ The Defendants did not offer another number in response or present any evidence to show that these figures were "merely excessive." Thus, the jury's determination that the appropriate measure of damages should not have been disturbed. Also, the trial court found the verdict "excessive" based on limitations found in the Terms and Limitations Booklet that the Babaces did not receive until after they purchased their home. It was legal error to reduce the jury's verdict based on Moisture Free's attempt to modify its agreement with the Babaces after it went into effect. The Booklet they received after the transaction was a legal nullity and therefore not a proper basis for overruling the jury's

⁸⁵ R.p. Supp. 1, lines 14-20.

⁸⁶ R.p. Supp. 1, lines 10-13.

⁸⁷ R.p. 328, lines 10-11.

⁸⁸ R.p. 867, lines 17-19.

considered verdict. See generally *Sun Kist Inc v Citizens & Southern Nat Bank* 286 S C 272
355 F 2d 67 (Ct App 1985)

B The Court Erred in Limiting Plaintiffs Damages to the Disputed Provisions of the
Terms and Limitations Booklet

In granting the new trial *instumtuitu* the court imposed the disputed terms of the warranty
on the jury's proper determination of damages. At trial counsel for the Defendant argued to the
court that damages should be limited to the amount of the warranty.⁹⁷ The Judge told Defendant's
counsel that "You can argue that the warranty provides so forth. *That's for the jury to determine
what the warranty provides.*"⁹⁸ It was a question of fact whether the disputed terms of the warranty
limited the amount of possible damages.

However, the jury was not asked to determine what exactly constituted the terms of the
warranty. The parties disputed exactly what constituted their agreement and it was improper for the
trial court to impose a limitation that was disputed at trial and never resolved by the fact finder, the
jury. The jury only determined that the warranty was breached.

Similarly, at an earlier stage of the litigation Judge Cooper denied Defendant's motion to
stay the proceeding and compel arbitration because there was not a meeting of the minds regarding
the alleged arbitration agreement and to impose arbitration on the Plaintiff would constitute a post
contract unilateral alteration to the contract.

C The Trial Court Erred in Characterizing the Jury's Verdict as Actual Damages

Consequential damages are allowed in breach of contract cases. See *Stern & Stern Assocs*

⁹⁷ R p 817 lines 14-24

⁹⁸ R p Supp 2 lines 2-4 (emphasis added)

Immons, 510 S.C. 250, 423 S.E.2d 124 (1992). During the trial, Plaintiff's counsel differentiated between different types of damages. In a breach of contract case, the contract is nothing more than a promise and a breach of that promise is a breach of warranty and for that you're entitled to damages – actual damages – what was what the law calls the diminution in value of this home because of the breach of the warranty. There is [sic] second type: What is the cost of repair? ⁹⁴

At trial, Plaintiffs argued that replacing the stucco was a consequential damage of the breached warranty because the product is no longer used, is ineffective, and the only reasonable way to fix the damage is to replace the defective stucco. Chris Cooper, Plaintiff's witness who was qualified as an expert at trial ⁹⁵ stated that a strip and re-clad of the Babae house is the only way to fix the problem. Defendants did not rebut this testimony. Mr. Cooper indicated that barrier EIFS is now outlawed and banned ⁹⁶ and that attempted repairs are [q]uite simply ineffective. ⁹⁷ Plaintiff's counsel asked: In your opinion to a reasonable degree of professional competency is a repair of a barrier EIFS home – a repair of the Babae house possible? to which the expert replied: Certainly not. ⁹⁸

Further, the jury was not asked to differentiate between different types of damages. They were simply asked to answer two questions: whether the Defendant breached the warranty and if so, the amount of damages. Before charging the jury, Judge Early told the Plaintiff's and Defendant's

⁹⁴ R p Supp 3 lines 5-10-17

⁹⁵ R p 315 lines 13-18

⁹⁶ R p 309 lines 6-7

⁹⁷ R p 336 lines 13-14

⁹⁸ R p 329 lines 7-10

attorneys what he planned to charge with respect to damages and neither objected.⁹⁹ The verdict was read as follows: "Do you, the jury, find the Defendant Moisture Warranty Corporation breached its warranty that it issued to the Plaintiffs? Yes. State the amount of damages you find has sustained as a result of Defendant's breach of the warranty: 140,000."¹⁰⁰ The jury form did not differentiate between different types of damages and the trial court erred by construing the damages as actual damages. See Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (S.C. Ct. App. 2004).

CONCLUSION

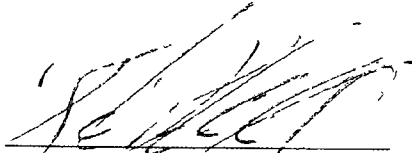
For the foregoing reasons, the Appellants, Fariborz and Malihe Babaee, respectfully submit that this Court find that:

- (1) The trial court erred in granting Defendant's motion for directed verdict as to Plaintiffs' causes of action for fraud and unfair trade practices due to the fact that there was enough evidence for each claim to be submitted to the jury because the warranty guaranteed a dry house while its acceptable level would not be considered dry under the standards of Clemson University.
- (2) the Trial Court erred in granting Defendant's motion for a new trial nisi remittitur because the jury's determination of damages was not excessive, there was no reason to impose the warranty to limit damages, and the damages should not have been construed to be actual instead of consequential.

Wherefore, the Babaees respectfully request that this Court reinstate the Jury's verdict. In the alternative, the Babaees ask this Court to remand this action to the trial court with the instruction that the Plaintiffs be allowed to proceed with their cause of action for breach of the South Carolina Unfair Trade Practices Act.

⁹⁹ R p 818, lines 9-19.

¹⁰⁰ R p 869, lines 6-10.


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July 30 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early III Circuit Court Judge

Case No. 06-CP-40 7215

Faiborz Z. Babae and Malihe Babae

Appellants/Respondents

vs.

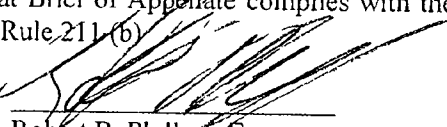
Moisture Warranty Corporation d/b/a Moisture Free Warranty and
Preferred Home Inspections, Inc.

Defendants

Of Whom Moisture Warranty Corporation d/b/a Moisture Free Warranty is Respondent/Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Brief of Appellate complies with the Order of the
Supreme Court dated August 13, 2007 and Rule 211(b).



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July 30, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early III Circuit Court Judge

Case No. 2006-CP 40-7215

Fahim Z. Babree and Malihe Babae

Appellants/Respondents

Moisture Warranty Corporation d/b/a Moisture Free Warranty and
Preferred Home Inspections, Inc. Defendants,

Of Whom Moisture Warranty Corporation d/b/a Moisture Free
Warranty is

Respondent/Appellant

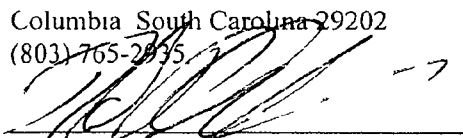
PROOF OF SERVICE

I certify that I have served *BRIEF OF APPELLATE* by depositing a copy of it in the United States Mail postage prepaid on July 30, 2010, addressed to its attorney of record as follows:

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July 30, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 06-CP-40-7215

Fariborz Z. Babaei and Malihe Babaei

Appellants/Respondents

VS.

Moisture Warranty Corporation d/b/a Moisture Free Warranty, and
Preferred Home Inspections, Inc.

Defendants

Of Whom Moisture Warranty Corporation d/b/a Moisture Free Warranty is Respondent/Appellant

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STATEMENT OF ISSUES ON APPEAL

- I THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT ON THE GROUNDS THE PLAINTIFFS REFUSED THE DEFENDANT'S ATTEMPT TO MAKE REPAIRS
- II THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT ON THE GROUNDS THAT THE DEFENDANT DID NOT BREACH ITS WARRANTY
- III THE TRIAL COURT DID NOT ERR IN EXCLUDING CERTAIN EVIDENCE REGARDING THE PURCHASE PRICE OF THE PLAINTIFFS' HOME

STATEMENT OF THE CASE

1 Procedure History

On December 5, 2006, Plaintiffs Fariborz and Malihe Babaei (hereinafter 'the Babaeis' or Appellants) brought suit against Defendants Moisture Warranty Corporation d/b/a Moisture Free Warranty (hereinafter Moisture Free "Defendant" or Respondent) and Preferred Home Inspections, Inc. in the Richland County Court of Common Pleas alleging six (6) causes of actions arising from their purchase of a Moisture Free Warranty on November 18, 2004. The Warranty purported to 'guarantee' that the Babaeis' synthetic stucco (a.k.a. EIFS) home was and would remain "dry" for the term of the Warranty.¹ The causes of action brought against Moisture Free included breach of contract, breach of contract accompanied by a fraudulent act, and breach of the implied covenants of good faith and fair dealing.²

Moisture Free moved to compel arbitration on February 1, 2007, based on the express terms of the Moisture Free Warranty.³ Attached to the Motion was a fifteen (15) page booklet entitled "The Terms and Limitations of the Moisture Free Warranty" (hereinafter "terms and limitations Booklet" or "Booklet") that was published in February of 2006, almost two (2) years after the Babaeis purchased a Moisture Free Warranty.⁴ The Babaeis opposed the attempt to compel arbitration based on a provision in a document that they had not received prior to their purchase of the Moisture Free Warranty. The Honorable G. Thomas Cooper, Jr. heard the motion on July 31,

¹R pp. 18-19

²R pp. 14-34

³R pp. 41-59

⁴Id. R pp. 62-3

2007 and held that Moisture Free ' failed to produce competent evidence that [the Babaees] entered into or even were aware of an arbitration agreement when they purchased the Moisture Free Warranty '5 Specifically Judge Cooper determined the Babaees only received Moisture Free's advertising and marketing materials prior to executing the contract he found no evidence that the Babaees received the Booklet prior to their purchase of the warranted property 6 The advertising and marketing materials the court referenced consisted of a ten (10) page brochure that contained certain terms & conditions of the Moisture Free Warranty (hereinafter Brochure) 7 The Brochure made no mention of an arbitration requirement 8 Finding that the Brochure rather than the Booklet formed the basis of a contract between the Babaees and Moisture Free Judge Cooper denied the motion to compel arbitration '[b]ecause South Carolina law does not permit the unilateral modification of the terms of a contract *after* a contract has been executed 9 Litigation followed and the case was ultimately tried to a jury before the Honorable Doyet A. Early III in the Richland County Court of Common Pleas on November 17 20 2008

After presenting their case in chief the Babaees proceeded with their claims of breach of warranty fraud and breach of the South Carolina Unfair Trade Practices Act claims 10 After hearing

R p 4

⁶R pp 4 5

⁷R pp 920 30

⁸Id

⁹R p 5

¹⁰R p 802 lines 14 20

from the parties.¹¹ Judge Early dismissed the Babaees' causes of action for fraud and violation of the South Carolina Unfair Trade Practices Act (SCUTPA).¹² The trial proceeded on the Plaintiffs' remaining cause of action for breach of warranty and the Jury returned a general verdict in the amount of \$140,000.00 for the Plaintiffs on November 20, 2008.¹³ Judge Early granted Moisture Free Warranty ten (10) days to file its post trial motions which were eventually heard on January 21, 2009.¹⁴ By Order filed and/or mailed on February 25, 2009, Judge Early granted Moisture Free's motion for a new trial *nisi remittitur* on the grounds that the amount of the verdict [was] merely excessive.¹⁵ The court reasoned that the verdict was in excess of any actual damages recoverable under the express terms of the warranty and that the "Plaintiff's expert, Chris Cooper, testified regarding costs wholly unrelated and not covered by the warranty."¹⁶ In support of its ruling, the court quoted from the Terms and Limitation Booklet that limited Moisture Free's "total aggregate liability of this Limited Warranty to \$20,000 per year."¹⁷ The Booklet was the same document Judge Cooper found the Plaintiffs did not receive until after they formed a contract with Moisture Free.¹⁸ Plaintiffs' counsel received a copy of Judge Early's post trial order on February 27, 2009, and

¹¹ R p 802 line 18 p 813 line 15 (argument of plaintiffs' counsel)

¹² R p 813 lines 16-23 (argument of plaintiffs' counsel)

¹³ R p 12, p 869 lines 2-15

¹⁴ R p 870 lines 9-20

¹⁵ R p 9

¹⁶ R p 10

¹⁷ Id

¹⁸ R pp 4-5

filed its Notice of Appeal on March 2, 2009.¹⁹ This appeal followed the Babaees' earlier appeal.

2 Evidence Presented at Trial

Plaintiffs purchased a home from Giuseppe and Maria Maoli on November 18, 2004. The home's exterior is clad with a type of synthetic stucco known as an Exterior Insulation Finish System, or by its acronym EIFS.²⁰ EIFS is a multi-layer system that is attached to a home's wooden structure and looks like traditional stucco.²¹ Unlike other types of exterior cladding (i.e. brick, hard coat-stucco, etc.) EIFS traps moisture behind it where it can damage a home's wooden structure.²² This propensity to cause moisture damage led to the product being banned from use on wood-framed residential construction.²³

Before purchasing their home, the Babaees retained a local contractor and EIFS expert, Frank Clark of CK Services, Inc.²⁴ CK Services did two inspections for the Babaees. The first was a visual inspection of the entire property that identified repair and maintenance items in the home's interior, crawlspace, and lawn.²⁵ The second was an inspection of the home's EIFS exterior cladding. CK determined that certain areas of the EIFS had not been installed in accordance with manufacturers' recommendations and recommended that test cuts be made into the EIFS to determine if the home

¹⁹ Notice of Appeal at p. 1.

²⁰ R. p. 150, lines 15-17.

²¹ R. p. 159, lines 8-17 (testimony of Bill Flaherty).

²² R. p. 159, line 22 - p. 160, line 11 (testimony of Bill Flaherty).

²³ R. p. 863, line 21 - p. 865, line 10 (testimony of Ron McClure); p. 599, line 1 - p. 600, line 2 (testimony of Chris Burton).

²⁴ R. p. 434, lines 13-14 (testimony of Fariborz Z. Babaei).

R. p. 435, line 8 - p. 436, line 22 (testimony of Fariborz Z. Babaei); p. 935-39.

suffered from moisture damage behind the EIFS²⁶ The Babaees asked the sellers Mr and Mrs Maoli for permission to perform the testing recommended by CK but they refused²⁷ At that point the Babaees decided to walk away from purchasing the house²⁸ However as an alternative to the test cuts recommend by the CK inspection the Maolis offered to purchase a Moisture Free Warranty for the Babaees that would ensure the home was dry and would remain dry for the term of the Warranty or Moisture Free would fund a repair²⁹ The Maolis provided the Babaees with the Brochure outlining the terms and conditions of the Moisture Free Warranty³⁰

The Brochure claimed Moisture Free's mission was "to protect stucco homes from moisture intrusion through a process of inspecting repairing and protecting a stucco home"³¹ It further explained that Moisture Free "know[s] what steps to take to assure homeowners that their home is dry and we guarantee their home will remain dry during the term of the warranty or we'll pay to get it dry"³² The Brochure also set out in detail Moisture Free's process for issuing a warranty

Three Easy Steps to a MoistureFree Warranty

A three step process must take place before a MoistureFree Warranty is issued

²⁶ R pp 901-19 p 439 lines 1 to p 440, line 10 (testimony of Fariborz Babae)

²⁷ R p 438 line 8 p 443 line 6 (testimony of Fariborz Z Babae) pp 901-19 (CK Services Inspection)

²⁸ R p 443 lines 8-11 (testimony of Fariborz Z Babae)

²⁹ R p 443 lines 12-25 (testimony of Fariborz Z Babae)

³⁰ R p 443 line 12 p 444 line 5 p 432 line 11 - p 433 line 9 (testimony of Fariborz Z Babae) pp 920-30

³¹ R pp 921-924

³² R p 924 (punctuation in original)

Inspection

Have the home inspected using the MoistureFree Inspection Protocol or by calling us

Review and Recommendations

The inspection is reviewed by one of our Warranty Specialists. If repairs are necessary to meet warranty requirements, we are available to guide you through the repair process. If repairs are required, an inspector must visit the home and verify the repairs have been made effectively and according to MoistureFree Warranty standards.

Warranty Issued

Moisture Warranty Corporation issues a Warranty Authorization Certificate that warrants the home is dry and will remain dry during the term of the warranty, or we will pay to get it dry, based on the terms of the warranty.³³

The Brochure also claimed the Moisture Free Warranty was selected by the nation's largest EIFS manufacturer, Dryvit Systems Inc., to be provided to its customers as part of a class action settlement. It offered warranty purchasers the peace of mind of knowing that they have the same protection: the largest stucco manufacturer is providing for its homeowners nationwide.³⁴

Mr. Babaee testified that he relied on the Brochure in making his decision to purchase his home. When asked about the significance of Brochure, Mr. Babaee explained that

I own a company as well. My mission statement – The first line of my website explains who we are, what we do, what type of organization we are. A lot of our customers sign up with us because of our mission statement and we stand behind our mission statement because it's something that you have to prove as a business owner.

³³ R. p. 925 (emphasis in original)

³⁴ R. p. 926

³⁵ R. p. 444, line 18-25 (testimony of Fariborz Z. Babaee)

Mr. Babaee went on to testify that he did not receive any other “terms and conditions” regarding the Moisture Free Warranty prior to his purchase of the home and Warranty on November 18, 2004.³⁶

In January of 2005, Mr. Babaee received an Authorization Certificate from Moisture Free stating there was an exclusion to the Warranty due to excess moisture that was discovered by an inspector for Moisture Free. Mr. Babaee called Moisture Free and inquired about the exclusion. Moisture Free then sent another inspector, Daniel Claver, to inspect the home. Based on the Claver inspection and without requiring any repairs, Moisture Free removed the exclusion.³⁷ At this point, Mr. Babaee became concerned about the performance of Moisture Free because it removed the exclusion without doing anything to address the moisture problem identified by the exclusion.³⁸ Shortly thereafter, Mr. Babaee noticed a dark stain on the outside of his home which he then reported to Moisture Free.³⁹ Moisture Free next sent a North Carolina contractor named Frank Guidera to inspect the Babaee home.⁴⁰ Mr. Guidera produced an estimate that indicated it would require nearly \$10,000.00 for him to access the extent of moisture problems behind the walls and address those moisture problems he had already identified.⁴¹ Shortly after Mr. Guidera’s visit, Moisture Free sent Mr. Babaee a letter dated April 17, 2006 explaining that under the terms and conditions of its Warranty, Moisture Free was only obliged to pay the Babaees \$750 toward the moisture damage.

³⁶ R. p. 452, line 21; p. 453, line 23 (testimony of Fariborz Z. Babaee)

³⁷ Id. R. p. 934, p. 323, line 18 to p. 324, line 1 (Testimony of Chris Burton)

³⁸ R. p. 454, line 7-25 (testimony of Fariborz Z. Babaee)

³⁹ R. p. 444, line 5-24 (testimony of Fariborz Z. Babaee)

⁴⁰ R. p. 456, line 1-16 (testimony of Fariborz Z. Babaee)

⁴¹ Id.

it had identified⁴² Attached to its letter making the \$750 offer was a copy of a document entitled Terms and Limitations Booklet ('Booklet)⁴³ The letter explained that according to the attached terms and limitations Moisture Free was only obliged to make the minimal payment⁴⁴ In response to the \$750 offer Mr Babae consulted the contractor who put the stucco on the house originally along with some other local repair contractors all of who informed Mr Babae that they ' could not touch the house⁴⁵ As a result of these conversations Mr Babae informed Moisture Free that it would cost substantially more than \$750 to repair his home⁴⁶

During the trial of this matter and now on appeal Moisture Free tries to contradict the Babae's testimony and demonstrate that they received the Booklet before their purchase of the Warranty in spite of the fact that this factual contention was rejected by Judge Cooper in his order denying Moisture Free's motion to compel arbitration based on a clause in the Booklet Judge Cooper found that the Babae's did not receive the Booklet until after they purchased the Warranty and therefore as a matter of law the terms and conditions of the Booklet are unenforceable⁴⁷

⁴² R pp 997-1028 p 458 lines 24 to p 460 line 24 p 554 line 15 to p 555 line 1 (testimony of Fariborz Babae)

⁴³ Id

⁴⁴ R p 460 lines 4-24 (testimony of Fariborz Babae) Interestingly, Moisture Free has offered different versions of the Booklet in support of its claim that the Babae's received it prior to their purchase of the Warranty This merely underscores the fact that Moisture Free's claim that Mr Babae received the Booklet prior to his purchase of the Warranty is mere speculation and lacks a factual basis

⁴⁵ R p 462 line 22 to p 463 line 10 (testimony of Fariborz Babae)

⁴⁶ R p 464 lines 7-19 (testimony of Fariborz Babae)

⁴⁷ R pp 4-5

Although Judge Cooper's Order was never appealed Moisture Free's counsel⁴⁸ repeatedly tried to revisit that at trial. First Moisture Free argued it learned after Judge Cooper's ruling that a realtor named Buddy Lewis would testify the Babaees received the Booklet prior to purchasing the warranty.

MF Counsel: Contrary to what Mr. Babaeec told you, the realtor is going to say he knew exactly what was the terms of his warranty.⁴⁹

In fact, the evidence presented at trial proved otherwise. The realtor in question, Carl "Buddy" Lewis of Russell & Jeffcoat Realtors, represented both the buyers and the sellers.⁵⁰ Moisture Free admitted that it had many business dealings with Mr. Lewis regarding the sale of EIFS homes.⁵¹ Mr. Lewis testified several times that he did not provide the Booklet to the Babaees.⁵² Mr. Lewis explained that Moisture Free issues the Booklets just like termite companies issue termite bonds: the warranty is just like on a termite bond, the check goes to the warranty company, and then the bond comes back.⁵³ The importance of this testimony was not lost on the trial judge who interjected a question of the witness regarding what material Mr. Lewis provided the Babaees. Mr. Lewis responded that "[t]he only thing I gave with regard to the moisture warranty was this piece of paper

⁴⁸ Moisture Free's trial counsel is different than the lawyers representing it on appeal. Its appellate lawyers did not make an appearance in this matter until the hearing of post trial motions and are in no way connected to the trial matters discussed herein.

⁴⁹ R p 410 lines 20-22

⁵⁰ R p 762 lines 14-18, p 782 lines 3-5 (testimony of Carl "Buddy" Lewis)

⁵¹ R p 583 lines 22-24 (testimony of Chris Burton)

⁵² R p 769 lines 1-16 (testimony of Carl "Buddy" Lewis)

⁵³ R p 771 lines 2-24 (testimony of Carl "Buddy" Lewis)

(one page authorization certificate for the warranty) ”⁵⁴

Secondly Moisture Free claimed it would provide newly discovered evidence that the Babaees received the Booklet prior to their purchase of the warranty, but the trial judge ruled against Moisture Free

Trial Court Judge Cooper cited the factual background and held that the Defendant moisture Warranty Corporation s motions to stay proceedings and compel arbitration is denied [Addressing Moisture Free’s counsel] why in the world is it now relevant when you ve already been before another judge? I can t overrule another judge

MF Counsel [Mr Babae] said he didn t receive [the Booklet] – it wasn t subject to arbitration and that s why [Judge Cooper] ruled the way he did And we did say [Mr Babae] received the terms and conditions of the warranty which my client will say he did and Mr Babae says he didn t but he obviously did and also he received the whole warranty and the authorization certificate which he – At that time we didn t have a signed copy, I don t believe

Trial Court When did you learn he did receive it?

MF Counsel During the course of discovery Your Honor

Trial Court Did you move to reconsider the order of Judge Cooper?

MF Counsel We didn t because we were already in litigation Your Honor So we could have moved to -

Trial Court Hold on a second

[MF Counsel seems to argue it raised this argument in a proposed order that it submitted to Judge Cooper but that he did not sign]

MF Counsel So Your Honor we did raise this issue

Trial Court And you got ruled against

⁴ R p 771 lines 20 21 (testimony of Carl Buddy Lewis)

MF Counsel Yes but we did -

Trial Court What else - - I can't help that he ruled against you ⁵⁵

Although the Babaees counsel sought clarification of the ruling the Judge instructed both attorneys, in the strongest of terms to not revisit Judge Cooper's ruling ⁵⁶ Despite this, MF's Counsel asked [M]y client wants to testify about [the Booklet] because he said he sent it to them - the terms and conditions of the warranty to which the Court instructed Moisture Free's counsel that "[y]our client had better not talk about it either ⁵⁷

Although the receipt of the Booklet after their purchase did not alter their warranty agreement with Moisture Free it did alert the Babaees that the Moisture Free Warranty program would not provide them with a 'dry' home Moisture in wood used to build homes is measured on a scale of 1% to 31% where 31% represents the upper range of full moisture saturated wood ⁵⁸ Clemson Extension has set forth guidelines regarding wood moisture content that were introduced during the trial of this matter ⁵⁹ According to Clemson, a wood moisture content (WMC) of 20% to 24% indicate[s] a serious problem somewhere The excess moisture source must be immediately corrected and the situation carefully monitored until the WMC returns to the 12[%] to 16[%] range ⁶⁰ The Babaees did not learn until their receipt of the Booklet that Moisture Free does not

⁵⁵ R p 544 line 10 to p 547, line 13 (counsel argument)

⁵⁶ R p 547 line 15 to p 548 line 13 (counsel argument)

⁵⁷ R p 548 lines 8-20 (counsel argument)

⁵⁸ R p 888

⁵⁹ R p 931-33

⁶⁰ Id

provide for any action under its Warranty until the WMC reaches 25%⁶¹ Plaintiffs expert Bill Flaherty testified to the applicability of the Clemson standard in the EIFS industry and confirmed that a WMC of 20 to 24 percent is indicative of a significant problem based on the Clemson and other recognized standards applicable to the building industry⁶² Mr Flaherty, who has performed several protocol inspection for Moisture Free in the past, also testified that the 25% moisture standard that Moisture Free represented to the Babaees was much higher than the 20% standard Moisture Free offered to the Dryvit class action settlement that Moisture Free touted in the Brochure that was provided to the Babaees⁶³ In fact Mr Flaherty testified that Moisture Free did not follow its inspection protocols and made no repairs to the Moisture Free Warranty standards at the Babae home⁶⁴ The Plaintiffs introduced evidence at trial that EIFS can not be repaired and that the only way to ensure a “dry” home in South Carolina is to remove the EIFS and replace it with another type of siding The Babaees offered the testimony of an experienced EIFS repair contractor that the necessary repairs would cost at least \$201,416.00⁶⁵ Mr Babae also testified that he believed the value of his home was diminished by \$220,000 due to its EIFS exterior⁶⁶ Moisture Free did not offer any estimate of what it would cost to repair the Babaees home and did not call its North

⁶¹ R p 888 p 934, p 162 line 22 p 163 line 4 (testimony of Bill Flaherty)

⁶² R p 160 line 24 p 161 line 4 p 161, line 5 p 163, line 4 (testimony of Bill Flaherty)

⁶³ R p 161, line 22 p 163 line 19 (testimony of Bill Flaherty)

⁶⁴ R p 159 line 22 p 160, line 11, p 166 lines 11-16, p 164 line 11 to p 165 line 5 p 187 line 11 p 188 line 17 (testimony of Bill Flaherty)

⁶⁵ R p 325 line 20 p 327 line 19 (testimony of Chris Cooper) pp 889-895

⁶⁶ R p 867 line 15 p 868 line 16 (testimony of Fred Babae)

Carolina contractor Frank Gudieria to testify at trial

ARGUMENT

I THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT ON THE GROUNDS THE PLAINTIFFS REFUSED THE DEFENDANT'S ATTEMPT TO MAKE REPAIRS

AND

II THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT ON THE GROUNDS THAT THE DEFENDANT DID NOT BREACH ITS WARRANTY

Because Moisture Free's first and second arguments are controlled by similar factual and legal error they will be addressed jointly for the convenience of the Court

Standard of Review

In reviewing a directed verdict motion, the appellate court must view the evidence and all reasonable inferences from the evidence in the light most favorable to the party opposing the motion. Furthermore, if the evidence is susceptible of more than one reasonable inference, the trial court should deny the motion for directed verdict and case should be submitted to the jury. *Scoggins v McClellion*, 321 S.C. 264, 468 S.E.2d 12-14 (Ct. App. 1996). A jury issue exists where the evidence is susceptible of more than one reasonable inference. *Botchie v O Dowd*, 318 S.C. 130, 456 S.E.2d 403 (1995). *Welch v Epstein*, 342 S.C. 279, S.E.2d 408 (Ct. App. 2000). A court must deny the motion when the evidence yields more than one inference or its inference is in doubt. *Welch v Epstein*, 342 S.C. 279, S.E.2d 408 (Ct. App. 2000). The appellate court will reverse the trial court when there is no evidence to support the ruling or the ruling amounts to an error of law. *Creech v South Carolina Wildlife & Marine Resources Dept.*, 328 S.C. 24, 491 S.E.2d 571 (1997). When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has

authority to decide credibility issues or to resolve conflicts in the testimony or evidence *Reiland*
v. Southland Equip. Serv. Inc. 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998)

A. The Terms and Conditions Brochure Did Not Provide a Legal Basis for Granting
Moisture Free's Motion for a Directed Verdict or Judgment Not Withstanding the Verdict

As set forth above, the Babaees maintained throughout this litigation that they did not receive the terms and conditions Booklet until after they purchased the Warranty and made a claim for moisture damage. Moisture Free contested this assertion in its Motion to Compel Arbitration. The dispute was decided by Judge Cooper in his Order entered on October 2, 2007 wherein he found no competent evidence that the Babaees received the Booklet prior to their purchase of the Warranty.⁶⁷ By providing the Booklet to the Babaees after the purchase, the Court found that Moisture Free was attempting to unilaterally modify a contract after it has been executed. The Court held such an attempt was violative of South Carolina law pursuant to *Sun Kist, Inc. v. Citizens & Southern Nat. Bank*, 286 S.C. 272, 333 S.E.2d 67 (Ct. App. 1985) and related precedent.⁶⁸ Although Moisture Free did not appeal the July 31st ruling, it did try to challenge the Order at trial. The trial judge properly found that he had no authority to overrule the July 31st Order of another circuit court judge and issued certain prohibitions regarding that issue.

It is axiomatic that one circuit court judge does not have the authority to set aside an order of another circuit judge. *Enorec Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986). Accordingly, the Trial Court did not have the authority to disregard the October 31st Order and revisit an issue that had already been decided by another circuit court judge. Because the terms

⁶⁷ R. p. 4

⁶⁸ R. p. 5

and conditions of the Booklet can not be retroactively imposed on the Babaees Moisture Free lacked a basis for requesting either a directed verdict or judgment notwithstanding the verdict based on the terms and conditions contained in the verdict For that reason Moisture Free s first and second arguments on appeal must fail

B Even if the Babaees Were Subject to the Terms and Conditions Brochure,
the Evidence Presented at Trial Was Susceptible to More than One Inference
So the Case Was Properly Submitted to the Jury

Throughout the discovery process Moisture Free failed to produce any evidence that the Babaees received the Booklet prior to their purchase of the Warranty Its last minute “promises” to produce newly discovered evidence at trial also failed to materialize Even if the Court was not persuaded to recognize the July 31st Order deciding the matter, neither a directed verdict nor judgment notwithstanding the verdict would have been appropriate as the evidence presented at trial was susceptible to an inference that the Babaees had not received the terms and conditions Moisture Free wishes to assert It has long been the tradition in South Carolina that a party’s failure to produce testimony of an available witness on a material issue can give rise to an inference that such testimony would be adverse to that party *See e g Johnson v Windham* 224 S C 502 80 S E 2d 234 (1954) With regard to this issue as well as many others in the trial of this matter Moisture Free failed to produce at trial any of its employees or agents who dealt with the Babaees prior to the instigation of this lawsuit That not only includes staff at its North Carolina headquarters but the North Carolina repair contractor and the other Moisture Free inspectors who inspected the Babaees home and met with them As to the Booklet issue the only witness with first hand knowledge of the transaction was the realtor Buddy Lewis who not only testified that the Babaees did not receive the Booklet, he testified that it was not Moisture Free s custom to provide the Booklet prior to the

purchase of the Warrant ⁶⁹

In addition to conflicting evidence regarding the issuance of the terms and conditions Booklet the Babaces also disputed Moisture Free's claim that it offered to repair their home. Mr. Babace testified that after Moisture Free's repair contractor inspected his home and produced a nearly \$10,000.00 repair estimate, the only offer he received from Moisture Free was for a \$750.00 payment.⁷⁰ Additionally, while he questioned by Moisture Free's counsel, its president Chris Burton admitted to the Court's inquiry that it does not repair homes itself.

Babaces

Counsel: I object to this line. Your honor, there is no contractor at issue in the case. Nothing was done.

Mr. Burton: That's our process.

Trial Court: I am trying to be fair, but how you do it in every other case I understand has some relevancy, but let's talk about this case.

Just streamline how you handle the warranty claim, but there wasn't a contractor in this case. I'll let you go a bit into how you handle it, but let's move along.

Mr. Burton: The way that we handle claims typically is we got a contractor involved. We can, if the homeowner elects that they would rather have a payout for the warranty, we can do that. We don't like to do that because it is - - We don't have the leverage that we have with contractors. We're sending millions of dollars worth of work to these guys so we can get cooperation from them to take care of problems that we run into in the field that the homeowner can't do.

Trial Court: How many claims have you had?

⁶⁹ R p 771 lines 2-24

⁷⁰ R p 464 lines 7-19

Mr. Burton: We've had about 700 claims.

Trial Court: You're spending millions of dollars with them? With the contractors?

Mr. Burton: I'm sorry. We're not spending - To get the homes repaired and in a condition for a warranty they have to get a contractor to start it off.

Trial Court: But you said you had leverage with the contractors because you're spending millions and millions of dollars.

Mr. Burton: The homeowners are spending money to repair the homes to get them up to warranty standards with those contractors. We certify the contractors and recommend them.⁷¹

As Mr. Burton explains, the Moisture Free Warranty program does not typically hire contractors to do repairs; it requires homeowners to make repairs pursuant to the three (3) step process outlined in the Brochure that the Babaees received. In this case, as in many others testified to by Plaintiffs' expert Bill Flaherty, Moisture Free does not enforce the repair requirements of its Warranty, thereby leaving a home purchaser with damage for which Moisture Free will not fully fund an adequate repair.

As demonstrated above, there was an abundance of evidence at trial that Moisture Free did not provide the Babaees with the terms and conditions Booklet and never offered to make any repairs as it claims the Brochure entitles it to do. Therefore, the trial judge was obliged to submit this case to a jury.

After hearing Moisture Free's post-trial motions, the trial court reversed the position it took at trial and made *sua sponte* the factual determination that the Babaees had received the terms and conditions Booklet.

The limited warranty was subject to several Terms and Conditions that were detailed

⁷¹ R. p. 655, line 24 to p. 657, line 10.

in the warranty provided to the Plaintiffs. The Plaintiffs were aware of the warranty as early as August 28, 2004, as it was provided to them when they signed the contract for the purchase of their home.⁷²

This finding is not only contrary to Judge Cooper's earlier finding, it is wholly unsupported by the record and Moisture Free's filing in this appeal. In its brief, Moisture Free only offers two (2) pages of the trial transcript, 234 and 506, and an August sales contract in support of the Judge's finding. None of these provide any basis for such a ruling. The first transcript reference merely refers to a question posed to Mr. Babae.

MF Counsel: So you knew at that time, August 29, 2004, that you were going to get a moisture fee bond, right?

Mr. Babae: Correct.⁷³

The second transcript reference is a question raised to the realtor, Buddy Lewis, after he was shown a copy of a defense exhibit that he could not even definitely establish as having been produced to the Babaes.

MF Counsel: Did Mr. Babae see this document, Defendant's exhibit no. 10?

Mr. Lewis: I would assume he did.

MF Counsel: Were they aware that a moisture bond was in place with this contract dated August 29, 2004?

Mr. Lewis: I had it on the contract that said that the seller to pay \$4,095 at closing for moisture bond.⁷⁴

Exhibit 10 was a real estate contract, not the terms and conditions Booklet, and Mr. Lewis testified

⁷² R. p. 8.

⁷³ R. p. 497, lines 18-20 (Cross of Fred Babae).

⁷⁴ R. p. 766, lines 4-10 (testimony of Buddy Lewis); R. p. 961.

clearly that he did not provide the Booklet to the Babaees

MF Counsel At that [sic] time of the closing November 18 had the Babaees received a copy of the terms and conditions of the warrant?

Babaees
Counsel Objection Your Honor

Trial Court If you know that

Mr Lewis I do not know that

MF Counsel Did you give him a copy?

Mr Lewis I did not⁷⁵

Of course the Judge's imposition of the terms and conditions Booklet in support of his post trial motion is the subject of the Babaees' appeal in this matter. At trial, Moisture Free's counsel argued that damages should be limited to the amount of the warranty.⁷⁶ The trial court instructed counsel that [y]ou can argue that the warranty provides so forth *That's for the jury to determine what the warranty provides*.⁷⁷ It was a question of fact whether the disputed terms of the warranty limited the amount of possible damages. In proposing the jury verdict form, Moisture Free chose not to ask the jury to decide whether the terms and conditions Booklet was a part of the Warranty; it chose to submit a general verdict form. It now seeks to have its assertion decided by a court rather than by the trier of fact.

III THE TRIAL COURT DID NOT ERR IN EXCLUDING CERTAIN EVIDENCE REGARDING THE PURCHASE PRICE OF THE PLAINTIFFS' HOME

⁷⁵ R p 770 lines 16-23 (testimony of Buddy Lewis)

⁷⁶ R p 817 lines 14-24

⁷⁷ R p Supp 2 lines 2-4 (emphasis added)

In its appeal Moisture Free claims the Babaees negotiated a \$110,000.00 reduction in the purchase price of their home based on the Babaees' supposed desire to make repairs.⁷⁸ As an initial matter, the Babaees note that this assertion is made without reference to the record of this matter and merely relies on a similar naked assertion in a pre-trial memorandum.⁷⁹ No evidence was proffered at trial in support of the assertion nor is any law offered in support of Moisture Free's conclusory argument that Moisture Free is entitled to a judgment in its favor because this piece of evidence was excluded. Because Moisture Free's last argument is completely unsupported by evidence or legal theory, it may be dismissed. *Mulherin Howell v Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 594 (Ct. App. 2005).

By claiming that the Babaees had already been made whole for any problems by the seller's discounted price, it appears that Moisture Free is seeking to invoke the collateral source doctrine to offset its damages in this matter.⁸⁰ Rather than operating for the benefit of Moisture Free, the collateral source doctrine acts as a bar to the relief it seeks.

The collateral source rule prohibits a wrongdoer from seeking a reduction in the damages it owes an injured party based on any compensation that the injured party may have received from a source that is wholly independent from (collateral to) the wrongdoer. See e.g., *Mount v Sea Pines Co., Inc.*, 337 S.C. 355, 523 S.E.2d 464 (Ct. App. 1999). In this matter, there is no question that the sellers are independent of Moisture Free. They merely funded the purchase of the Moisture Free Warranty. There was no evidence presented at trial that they prohibited Moisture Free from

⁷⁸ Respondent/Appellant's Brief at p. 13.

⁷⁹ *Id.*

⁸⁰ Respondent/Appellant's Brief at p. 14.

performing whatever inspections it desired prior to issuing the Warranty. Additionally, there is no evidence that they were asked to make any repairs to the property prior to the issuance of the Warranty as Moisture Free's program would require. Moisture Free inspected the home and chose to issue a Warranty without any involvement with the sellers. Under such circumstances, there is no basis for invoking the collateral source rule.

The trial court excluded the evidence of the reduction after weighing its probative vs. prejudicial value as he is required to do under Rule 403, SCRE. Because the purchase price of the home had nothing to do with Moisture Free's obligations under its warranty, the evidence was properly excluded from the trial of this matter.

CONCLUSION

For the foregoing reasons, the Appellants/Respondents Fariborz and Malihe Babae respectfully request that this Court DENY an entry of judgment in favor of Respondent/Appellant Moisture Free Warranty, Inc.


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Columbia, South Carolina
July 30, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A Early III Circuit Court Judge

Case No 06-CP 40-7215

Fariborz Z Babace and Malihe Babace

Appellants/Respondents

vs

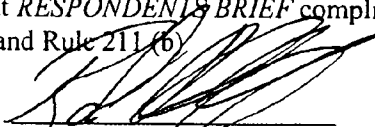
Moisture Warranty Corporation d/b/a Moisture Free Warranty, and
Preferred Home Inspections Inc

Defendants,

Of Whom Moisture Warranty Corporation d/b/a Moisture Free Warranty is Respondent/Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that *RESPONDENT'S BRIEF* complies with the Order of
the Supreme Court dated August 13 2007 and Rule 211 (b)



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July 30 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early III Circuit Court Judge

Case No. 2006 CP-40-7215

Ianborz Z. Babae and Malihe Babae

Appellants/Respondents

v

Moisture Warranty Corporation d/b/a Moisture Free Warranty and
Preferred Home Inspections Inc. Defendants

Of Whom Moisture Warranty Corporation d/b/a Moisture Free
Warranty is

Respondent/Appellant

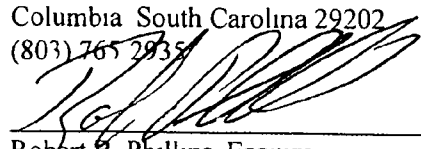
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Fariborz Z. Babaei and Malihe Babaei

Appellants/Respondents

vs

Moisture Warranty Corporation d/b/a Moisture Free Warranty, and
Preferred Home Inspections, Inc.

Defendants,

Of Whom Moisture Warranty Corporation d/b/a Moisture Free Warranty is Respondent/Appellant

REPLY BRIEF OF APPELLANTS/RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I THE TRIAL COURT ERRED IN GRANTING DEFENDANT’S MOTION FOR DIRECTED VERDICT AS TO PLAINTIFFS’ CAUSES OF ACTION FOR A VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT BECAUSE THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO CREATE A QUESTION OF FACT AS TO WHETHER A WARRANTY THAT “GUARANTEES” A DRY HOUSE, BUT ACTUALLY PERMITS MOISTURE LEVEL THAT EXCEED THE AMOUNT PERMISSIBLE BY APPLICABLE STANDARDS WAS DECEPTIVE**
- II WHETHER THE TRIAL COURT ERRED IN GRANTING DEFENDANT’S MOTION FOR A NEW TRIAL *NISI REMITTITUR* BECAUSE THE JURY’S DETERMINATION OF DAMAGES WAS NOT EXCESSIVE, THERE WAS NO REASON TO IMPOSE THE WARRANTY TO LIMIT DAMAGES, AND THE DAMAGES SHOULD NOT HAVE BEEN CONSTRUED TO BE ACTUAL INSTEAD OF CONSEQUENTIAL**

**REPLY TO RESPONDENT/APPELLANT MOISTURE FREE WARRANTY'S
STATEMENT OF FACTS**

In its Respondent's brief Respondent/Appellant Moisture Warranty Corporation d/b/a Moisture Free Warranty (hereinafter 'Moisture Free') presents contested facts as established and argument as a logical conclusion. For example, in footnote 1 to its brief, Moisture Free claims \$40,000 of a \$110,000 reduction in the purchase price of the Babaees' home was attributable to moisture-related issues with the EIFS cladding, simply because the Babaees performed \$70,000.00 worth of repairs to the home after moving in. In fact, Mr. Babae testified the \$70,000.00 represented work to improve the property such as adding a fence around the pool, painting inside and out, etc.¹ More importantly, the mischaracterized facts implies the Babaees knew of and intended to address moisture problems behind the EIFS after purchasing the home. As Mr. Babae explained at trial, he retained a contractor named Frank Clark to inspect the subject property's EIFS prior to its purchase instead of relying on an inspection done by a Moisture Free Warranty inspector named Charles Strickland.² Although the Clark inspection determined that certain areas of the EIFS had not been installed in accordance with manufacturers' specifications, he did not identify any areas that required a repair, but rather recommended that further tests/cuts would be necessary to determine if there were "moisture related issues" behind the EIFS.³ The sellers would not permit such testing, so the Babaees decided to walk away from purchasing the house.⁴ In lieu of the moisture inspection

¹ R p 437, lines 4-22 (testimony of Fariborz Z. Babae)

² R p 434 lines 1-14 (testimony of Fariborz Z. Babae)

³ R p 439 line 18-25 (testimony of Fariborz Z. Babae) pp 901-19

⁴ R p 442 line 21 to p 443 line 11 (testimony of Fariborz Z. Babae)

the Babaees sought, the sellers offered to purchase a Moisture Free Warranty so that the Babaees could rely on Moisture Free to inspect the home and fund any repairs that may become necessary to keep it dry ⁵

Argument

Moisture Free argues that the trial court properly reduced the jury's verdict because (1) the terms and conditions of the Moisture Free Warranty "expressly limited" the Babaees' damages to \$20,000 per year, and (2) the Moisture Free Warranty does not provide for the type of repairs sought by the Babaees at trial. As to the first issue, the Babaees contested at trial Moisture Free's claim that it received the written material containing the \$20,000 limitation. Moisture Free now seeks to assert The Babaees received a Brochure outlining the terms and conditions of the Moisture Free Warranty rather than the Terms and Conditions document asserted by Moisture Free ⁶. Nevertheless, regardless of where the \$20,000 coverage limitation is found, it is irrelevant to the damages awarded by the jury in this case as the damages were consequential in nature and not prohibited or capped by the \$20,000 coverage limitation.

Assuming *arguendo* that the maximum coverage available in any given year under a Moisture Free Warranty is \$20,000.00, such a limitation would only be applicable to a calculation of actual damages in a breach of contract matter. It is not characterized, nor can it act as a limitation on consequential damages flowing from the breach of the contract by Moisture Free. As explained to the trial court at the hearing of Moisture Free's post trial motions, the Babaees' claim was for

⁵ R p 443 lines 12 to p 444 line 5 (testimony of Fariborz Z. Babae)

⁶ R p 443 line 12- p 444 line 5 p 432 line 11 p 433 line 9 (testimony of Fariborz Z. Babae) pp 920-30

'consequential rather than actual damages at trial'⁷ As the Babaees' experts explained the type of repairs contemplated by the Moisture Free Warranty will not work in South Carolina

Plaintiffs' expert Bill Flaherty, a former Moisture Free Warranty inspector, opined that in areas as [sic] such as South Carolina where they employ vapor retarders, EIFS cladding should not be on the exterior of the home because of the problems [with moisture] that we just talked about'⁸ Mr. Flaherty explained that attempts to retrofit' EIFS (i.e. apply the EIFS in accordance with manufacturers specifications) failed in the late 1990s'⁹ Rather than the "repairs" promised by Moisture Free, the Babaees argued that the only way to ensure a "dry" home in South Carolina is to remove the EIFS and replace it with another type of siding. Contractor Chris E. Cooper was qualified as an expert repairing EIFS systems'¹⁰ Mr. Cooper is a residential and-commercial builder who began applying EIFS to homes in 1988'¹¹ When moisture damage problems were identified with EIFS homes in the mid-1990s, Mr. Cooper was part of an EIFS industry effort to determine how those home may be repaired'¹² Although Mr. Cooper patented a type of flashing known as a pan flashing to help repair EIFS homes, he ultimately came to the opinion that repairs are ineffective'¹³

⁷ R. p. 880

⁸ R. p. 180, line 16 to p. 182, line 17 (testimony of Bill Flaherty)

⁹ R. p. 291 lines 8 to p. 282 line 4 (testimony of Bill Flaherty)

¹⁰ R. p. 307 line 17 - p. 308 line 3, p. 310 line 17 - p. 315 line 18 (testimony of Chris Cooper)

¹¹ R. p. 307, line 17 - p. 308, line 24 (testimony of Chris Cooper)

¹² R. p. 307 line 17 - p. 308 line 24 (testimony of Chris Cooper), p. 863, line 21 - p. 865, line 10 (testimony of Ron McClure)

¹³ R. p. 312, line 7 - p. 313 line 11, p. 344, lines 18-22 (testimony of Chris Cooper)

Mr Cooper explained that EIFS repairs attempt to take a 'system which is now outlawed and banned and trying to patch it up or bandaid it to stop water from getting in behind it which is what we did [as part of the EIFS industry effort] but water still got behind because it was failure to begin with and it was a failure to try and repair and it didn t work ¹⁴ Mr Cooper explained that the failure of EIFS repairs now makes it cost prohibitive for his company to get liability insurance for EIFS repair work ¹⁵ He further opined that the Babaee home could not be repaired because repair techniques in general are inferior to the original application work and the work contemplated by Moisture Free are just as ineffective ¹⁶ Mr Cooper produced a detailed estimate of \$201 416 to remove the EIFS and replace it with hardcoat stucco on the Babaee s home ¹⁷ Significantly, Moisture Free did not call any of the repair contractors or EIFS inspectors that it had dispatched to the Babaee home prior to litigation to address Mr Flahertys and Mr Cooper s claims about the failure of the Moisture Free Warranty s repair protocols

_ It is axiomatic that consequential damages are available in a breach of contract case where such damages are within the contemplation of the parties at the time the contract was made *Goodwin v Hilton Head Co* 273 S C 758 761 259 S E 2d 611, 613 (1979) overruled on other grounds *Fici v Koon* 372 S C 341 642 S E 2d 602 (2007) In this matter, Moisture Free promised the Babaees repairs by an industry expert to make their home dry Plaintiffs presented testimony that an EIFS homes in South Carolina can not be repaired but that it has to be replaced in a process

¹⁴ R p 309 lines 6 11 (testimony of Chris Cooper)

¹⁵ R p 335 lines 10 - 20 (testimony of Chris Cooper)

¹⁶ R p 336, line 8 - p 337 line 22 (testimony of Chris Cooper)

¹⁷ R p 325, line 20 - p 327, line 24 (testimony of Chris Cooper)

commonly referred to as a strip and reclad Moisture Free s litigation expert tacitly agreed with the Babaees' experts when he admitted on cross-examination that EIFS has been banned for use on residential property by the State of North Carolina ¹⁸

The trial court erred by characterizing the jury's verdict as actual rather than consequential damages where Moisture Free had not raised the issue at trial and proposed a general jury verdict form that had not asked the jury to characterize its verdict as either general consequential etc ¹⁹ Counsel for the Babaees explained that they had 'bought a house based on representations in the [Moisture Free] Warranty and then found out that the repairs that the warranty offered couldn't be done in South Carolina by a contractor with [liability] insurance ²⁰ The Babaees did not put forth any calculation of what was allegedly owed under the warranty agreement, instead they argued their reliance on the Moisture Free Warranty lead them to believe that EIFS repairs were possible when in fact the only repair option available to them was to remove the EIFS and reclad the home with another product ²¹

Additionally, Mr Babae argued he suffered damage in the amount of \$240,000 due to the diminution in value of his home based on the fact that it was clad with a product that was no longer used on residential construction and could not be repaired by an insured contractor ²² In cases where there have been allegations of defective repairs our courts have recognized that the proper measure

¹⁸ R p 865 line 14 to p 866, line 2 (testimony of Ron McClure)

¹⁹ R pp 880-81

²⁰ R p 880

²¹ Id

²² Id , R p 867, lines 15 to p 868, line 10 (testimony of Fariborz Z Babae)

of damage is the diminished value caused by the defective repair along with other losses proximately resulting from the defect *Cf Hutson v Cummins Carolinas Inc* 280 S C 552 314 S E 2d 19 (Ct App 1984)

Moisture Free also argues the Babaees Notice of Appeal is defective because it failed to specifically raise their appellate challenge to the trial court's ruling regarding their South Carolina Unfair Trade Practice ("SCUTPA") claim. Initially, the Babaees note for the record that their notice of appeal is not substantively different than the Notice of Cross Appeal filed by Moisture Free which failed to raise any specific grounds for its appeal. Fortunately, neither notice is defective given that both conform to the requirements set forth in Rule 203(e) SCACR. In pertinent part, Rule 203(e) requires a notice of appeal to "substantially" conform to the exemplar set forth in the Appendix section of the South Carolina Appellate Court Rules. Neither the exemplar for a notice of appeal (designated **Form 1 Notice of Appeal in a Civil Case**) or the notice of cross appeal (designated **Form 2 Notice of Appeal for a Cross Appeal in a Civil Case**) require a recitation of the issues that are eventually briefed to the appellate court. The sole substantive requirement for a notice of appeal is a reference to the order or judgment appealed from. As both parties' notice contain such a reference, both are effective under the Appellate Court Rules.

As to the substance of its briefing regarding the trial court's dismissal of the Babaees SCUTPA claim, Moisture Free's analysis erroneously claims the Babaees refused Moisture Free's offer to repair the Babaees' home.²³ Moisture Free Warranty's president, Chris Burton, could not put forth any direct evidence in support of that claim at trial.²⁴

²³ Respondent Brief of Respondent/Appellant Moisture Free Warranty at p 21

²⁴ R p 608 line 15 to p 608A, line 24 (testimony of Chris Burton)

Babae Counsel Do you have any evidence that you offered the Babaees to let
[Moisture Free s contractor] Frank Guidera fix their house?

Chris Burton I don t have evidence of that, no

Babae Counsel You admitted that Mr Guidera s estimate ranged from \$750 to nearly
\$10 000?

Chris Burton It did ²⁵

When pressed on offering any other contractor to perform repairs, Mr Burton finally admitted that

Babae Counsel Sir, my question was Moisture Free Warranty did not send a letter, an
e-mail or any document to Fred Babae offering to fix his house did
they?

Chris Burton No ²⁶

Similarly, Moisture Free also relies on the unsubstantiated testimony of Chris Burton to attempt to
refute the Clemson University and other relevant guidelines regarding wood moisture content to
argue that “Moisture Warranty’s use of twenty five percent as a benchmark is neither deceptive nor
unfair. In fact the Babaees were not promised any particular moisture reading, they were promised
a ‘dry’ home. Under the actual terms and conditions that the Babaees received from Moisture Free
after they purchased their home, they learned that Moisture Free defines moisture damage as
occurring at 25% even though the industry standard and the Clemson University standard is 19%.
The dismissal of their SCUTPA claim is tantamount to claiming that Moisture Free s use of the term
“dry” is mere puffing and that it fairly and clearly reflects the 25% standard. The Babaees

²⁵ R p 608A lines 2-7 (testimony of Chris Burton)

²⁶ R p 608A lines 21-24 (testimony of Chris Burton)

respectively claim that it does not.

CONCLUSION

For the foregoing reasons the Appellants, Fariborz and Malihe Babaei respectfully submit that this Court find that

- (1) The trial court erred in granting Defendant's motion for directed verdict as to Plaintiffs' causes of action for fraud and unfair trade practices due to the fact that there was enough evidence for each claim to be submitted to the jury because the warranty guaranteed a dry house while its acceptable level would not be considered dry under the standards of Clemson University,
- (2) the Trial Court erred in granting Defendant's motion for a new trial nisi remittitur because the jury's determination of damages was not excessive, there was no reason to impose the warranty to limit damages, and the damages should not have been construed to be actual instead of consequential

Wherefore the Babaeis respectfully request that this Court reinstate the Jury's verdict. In the alternative, the Babaeis ask this Court to remand this action to the trial court with the instruction that the Plaintiffs be allowed to proceed with their cause of action for breach of the South Carolina Unfair Trade Practices Act



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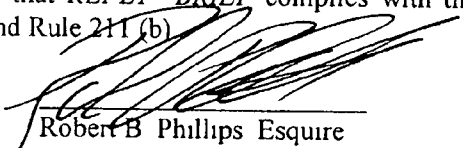
- Defendants

Of Whom Moisture Warranty Corporation d/b/a Moisture Free Warranty is

Respondent/Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that *REPLY BRIEF* complies with the Order of the
Supreme Court dated August 13, 2007 and Rule 211 (b).



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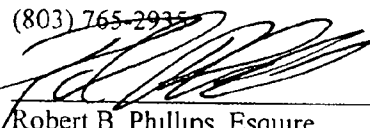
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v

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Moisture Free Warranty, and Preferred Home
Inspections Inc , Defendants

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is

Respondent/Appellant

**FINAL APPELLANT'S BRIEF FROM RESPONDENT/APPELLANT
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SC Court of Appeals

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Statement of Issues

- I THE TRIAL COURT ERRED IN FAILING TO GRANT MOISTURE WARRANTY'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE BABAEES REFUSED MOISTURE WARRANTY'S ATTEMPTS TO MAKE REPAIRS UNDER THE WARRANTY
- II THE TRIAL COURT ERRED IN FAILING TO GRANT MOISTURE WARRANTY'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT, AS MOISTURE WARRANTY DID NOT BREACH THE WARRANTY
- III THE TRIAL COURT ERRED AND PREJUDICED MOISTURE WARRANTY BY FAILING TO ADMIT THE BABAEES' \$110,000 CREDIT TOWARDS THE PURCHASE OF THEIR HOME

Statement of the Facts

Fariborz and Malihe Babae (The Babaees”) sought to purchase a home in 2004 from Giuseppe and Vittoria Maoli. In order to provide a moisture warranty bond from Moisture Warranty Corporation (“Moisture Warranty”) to a prospective purchaser, the Maolis had an inspection of their house on August 12, 2004. (Tr pp 492-493 R pp 753-754) The inspector was Charles Strickland and he issued a report of his findings. (Strickland Report R p 940)

The Babaees initially entered into a contract on the house on August 29, 2004. (Tr pp 234-506 August Contract R pp 497-766-961) The home had a stucco clad exterior. (Tr p 504 R p 764) This contract included a provision for the sellers to pay \$4,095 at closing for a moisture bond warranty. (Tr p 234-506 August Contract R pp 497-766-961) Mr. Babae gave a new contract to his realtor dated October 3, 2004, which listed the sale price as \$810,000. (Tr pp 506-507 October Contract, R pp 766-767-966) This contract also provided for sellers to pay at closing for a moisture warranty bond. (October Contract R p 969)

The closing date on this contract changed multiple times, but the closing eventually occurred on November 18, 2004. (Tr pp 208-209, HUD Settlement Statement R pp 471-472-974) On November 29, 2004, the Babaees were issued a 3-year limited warranty by Moisture Warranty with an exclusion of certain specified areas of the house, with a notation that the excluded area could become part of the warranty following remediation. (Authorization Certificate with Exclusion R p 898) This exclusion was later removed due to Moisture Warranty’s belief that the Babaees had made the necessary repairs to the area. (Tr pp 323-325-439-440 Plaintiff’s Exhibit

47, R pp 586-588, 701-702, 934) The warranty purchased by the Babaees limited the amount of any claim to \$20 000 per year and \$60 000 collectively over the 3 year period of the warranty (Terms and Conditions of Warranty at p 4 R p 101) The warranty purchased by the Babaees covered moisture intrusion (Authorization Certificate R p 898)

Prior to the closing on the home (and prior to the issuance of the warranty by Moisture Warranty) on November 8 2004 the Babaees received an inspection report regarding the home from Frank Clark Mr Clark's report indicated the existence of unacceptable moisture in the home In light of this report, the Babaees received a \$110 000 credit toward the purchase price of their home from the sellers for the costs of "stucco repairs or replacement" (Memorandum Supporting Post Trial Motions Exhibit C, R p 115) The contract price for the home was \$810 000 in October 2004 but the house was sold to the Babaees for \$700,000 in November, given the \$110,000 credit for stucco repairs (Tr pp 497-500, October Contract, HUD Settlement Statement R pp 758-761 966 974)

On January 3 2006 the Babaees sent a letter to Moisture Warranty stating the Babaees believed there were stucco problems with their home (Babaees January 3 2006 Letter, R p 978) Upon Moisture Warranty's request for more information the Babaees sent *a portion* of Frank Clark's report to Moisture Warranty (Tr p 259 Babaees January 11, 2006 Letter R pp 522, 979-995)¹

Moisture Warranty sent David Blackburn to inspect the home on February 21, 2006 and he issued a new report (Tr pp 371 408 Blackburn Report R pp 633

¹ Notably the Babaees attempted to change the date on this report to a date after the closing on their home but Mr Clark would not allow the change (Tr p 255 R p 518)

670 1014) Moisture Warranty provided the Babaees with a copy of the Blackburn Report (Tr p 409 R p 671) Additionally Moisture Warranty asked Frank Guidera a repair contractor to evaluate the range of possible repairs (Tr pp 370-372 R pp 632-634) In February 2006, Mr Guidera went to the Babaees house as part of this process (Tr pp 193, 265, R pp 456, 528)

Despite Moisture Warranty's attempts to evaluate the alleged damage and begin the repair process as provided by the warranty contract on April 17 2006 the Babaees demanded a check for \$20 000 for repairs to various areas of the home in which moisture had intruded (Tr p 409, Babaees April 17 2006 Fax R pp 671 1013) The Babaees April 17th letter referenced an oral estimate from Ace Drywall for over \$24 000 for repairs (Babae's April 17 2006 Fax R p 1013) Also on April 17 2006 in response to the Babaees demands Moisture Warranty sent the Babaees a copy of the warranty's terms and conditions (Tr pp 271-272 R pp 534-535) The letter stated, "[w]e will certainly attempt to satisfy the terms of the warranty as they apply to your home based on the evidence we have received " (Tr p 272 R p 535) Moisture Warranty requested the Babaees send them a detailed estimate from ACE Drywall (Tr p 272, R p 535) The Babaees never supplied this estimate, and again on April 21, 2006, the Babaees sent another demand letter for \$20 000 to Moisture Warranty (Tr p 272 April 21, 2006 Fax R pp 535 1029)

The Babaees would not allow Moisture Warranty to perform under the terms of the warranty and make repairs (Tr pp 409-410, R pp 671-672) The Babaees did not want repairs, they wanted money (Tr p 346, 409, Babaees' April 17 2006 Fax, Babae s April 21 2006 Fax R pp 608A 671, 1013 1029) Through the Blackburn

Report Moisture Warranty determined five locations in the house needed repairs (Tr p 410 R 672) As the Babaees would not allow Moisture Warranty to make the repairs, Moisture Warranty issued a check to the Babaees for \$2500, which was \$500 per area needing repair consistent with the Warranty terms (Tr p 410, R p 672) The Babaees did not deposit the \$2500 check and pursued litigation instead

On December 8 2006 the Babaees filed suit alleging various causes of action against Moisture Warranty, including fraud, constructive fraud, negligence, negligent misrepresentation negligent supervision, breach of express warranty, violations of the South Carolina Unfair Trade Practices Act and breach of contract breach of contract accompanied by a fraudulent act and breach of the implied covenant of good faith and fair dealing, related to the allegation that the Babaees home was not moisture free (Complaint R pp 16-34) At the heart of the dispute, the Babaees claimed that Moisture Warranty failed to perform under the terms of the parties' agreement The trial court granted Moisture Warranty judgment on every claim except for Plaintiffs' breach of warranty claim (Trial Court Order Granting New Trial *Nisi Remittitur* R p 8) The breach of warranty claim proceeded to trial and on November 20 2008 a jury returned a verdict in the amount of \$140 000 in favor of the Babaees (Verdict Form Form 4 Judgment R pp 12-13)

On November 26, 2008, Moisture Warranty timely filed its post-trial motions (Post Trial Motions, Memorandum Supporting Post Trial Motions R pp 81-116) The trial court denied Moisture Warranty's motions for judgment notwithstanding the verdict and new trial absolute (Trial Court Order Granting New Trial *Nisi Remittitur*,

R pp 7-11) The trial court granted Moisture Warranty s New Trial *Nisi Remittitur* motion and reduced the judgment to \$20 000 Id

Statement of the Case

On December 8, 2006, the Babaees filed suit against Moisture Warranty alleging fraud, negligence, negligent misrepresentation, violations of South Carolina Uniform Trade Practices Act and breach of warranty (Complaint, R pp 16-34). Subsequently, the trial court granted Moisture Warranty judgment on all of the claims except breach of warranty (Trial Court Order Granting New Trial *Nisi Remittitur*, R p 8).

On November 20, 2008, the jury awarded a verdict of \$140,000 for the Babaees (Verdict Form Form 4 Judgment, R pp 12-13). Moisture Warranty filed multiple post-trial motions which the Babaees opposed (Post Trial Motions Memorandum Supporting Post Trial Motions, R pp 81-116). The trial court granted Moisture Warranty's motion for new trial *nisi remittitur* (Trial Court Order Granting New Trial *Nisi Remittitur*, R pp 7-11). The trial court found the jury's \$140,000 award was excessive, did not bear a reasonable relationship to the injuries sustained by the Babaees, and was not supported by the evidence adduced at trial. Id. Further, the trial court held the Babaees' expert testified "regarding costs totally unrelated and not covered by the warranty, including but not limited to replacing the stucco exterior on parts of the home." Id. The trial court found the expert's damage estimates were therefore based on speculation and not the evidence presented at trial of costs that were readily ascertainable. Id.

The trial court determined Moisture Warranty's aggregate, potential liability under the warranty was capped at \$20,000 a year and at a \$60,000 total for the entire 3-year period of the warranty. Id. The trial court then reduced the judgment to \$20,000.

in granting Moisture Warranty's Motion for New Trial *Nisi Remittitur* Id The Babaees appealed the trial court's decision to reduce the judgment (Babaees' Notice of Appeal R p 124) Moisture Warranty then cross-appealed the trial court's denial of its post-trial motions for directed verdict and for jnov (Moisture Warranty s Amended Notice of Cross Appeal, R p 132) As a result this briefing addresses the error committed by the trial court in denying Moisture Warranty's motions for directed verdict and for jnov

Argument

I THE TRIAL COURT ERRED IN FAILING TO GRANT MOISTURE WARRANTY'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE BABAEES REFUSED MOISTURE WARRANTY'S ATTEMPTS TO MAKE REPAIRS UNDER THE WARRANTY

The record shows that the Babaees actions prevented Moisture Warranty from repairing the alleged damage to their home as the warranty permits Therefore the Babaees' breach of the warranty bars the Babaees from recovering in this action Thus, the trial court erred in failing to grant Moisture Warranty s motion for directed verdict and motion for judgment notwithstanding the verdict

"In ruling on motions for directed verdict and JNOV the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt " Strange v South Carolina Dep t of Highways & Pub Transp 314 S C 427, 429-30, 445 S E 2d 439, 440 (1994) The appellate court must reverse the trial court's ruling when there is no evidence to support the trial court's denial of the motions Id at 430

445 S E 2d at 440 Said differently when the evidence adduced at trial does not support the judgment then the denial of directed verdict or judgment notwithstanding the verdict motions must be overturned Clark v South Carolina Dep t of Pub Safety, 362 S C 377, 382 83, 608 S E 2d 573, 576-78 (2005) (reviewing the record to determine if the evidence presented at trial supported the verdict when determining if the trial court properly denied the motions for directed verdict and JNOV)

No evidence can support the trial court s ruling because as a matter of law, the Babaees may not recover for breach of contract as they failed to perform their obligations under the contract South Carolina law is clear that a person that does not perform his obligations under a contract cannot claim a breach of that same agreement See American Nat Bank, etc v Caldwell, 166 S C 194, 164 S E 613 (1932) (holding that if a party to a contract wishes to compel the other party to fulfill the terms of the contract the party seeking to enforce the terms of the agreement “must make his part of the agreement precedent and cannot proceed against the other without an actual performance of the agreement on his part or a tender and refusal ”) see also Parks v Lyons 219 S C 40, 48, 64 S E 2d 123, 126 (1951) (“It is an elementary principle that one who seeks to recover damages for the breach of a contract, to which he was a party must show that the contract has been performed on his part or at least that he was at the appropriate time able, ready and willing so to perform it ”), Swinton Creek Nursery v Edisto Farm Credit, ACA, 334 S C 469, 487, 514 S E 2d 126, 135 (1999) (“A party who seeks to recover damages for breach of a contract must show that the contract has been performed on his part or at least that he was at the appropriate time able, ready and willing to perform it ”) Accordingly, because the Babaees prevented

Moisture Warranty from making repairs to the subject property, the Babaees cannot recover for any purported breach of the agreement because the Babaees' conduct made performance impossible and the Babaees did not live up to their responsibilities under the agreement

Parks is analogous to the case at bar. There the Court held a nonsuit was properly ordered when plaintiff failed to show he had obtained the necessary funding by the purchase deadline and failed to provide evidence that he was willing, able and ready to perform under the contract by that date. Parks, 219 S.C. 46-47, 64 S.E.2d at 125-26. The Court in Parks went on to state:

In the case at bar, not only did the plaintiff fail to establish that he was able and ready to comply with the contract on his part, but the testimony given by him and in his behalf is affirmatively to the contrary. Consequently, if the plaintiff were to recover damages, the result would be essentially unjust and hence the order of nonsuit was correct.

Parks, 219 S.C. at 49, 64 S.E.2d at 127.

Moisture Warranty's warranty specifically provided that Moisture Warranty may fulfill any warranty obligations it has by making repairs as opposed to paying money. The warranty states:

Warrantor [Moisture Warranty] *reserves the right to make repairs or modifications* to the area of failure based on standard industry practices and will have full discretion over the type of repair or modification that is to be made at the specific area that is determined to have high moisture behind the exterior cladding.

(Terms and Conditions, R p 101) (emphasis added). Further, Section II (B) subparts 1 and 2 of the warranty explain:

1. In the event of the failure of a sealant or flashing on the home's exterior, Warrantor [Moisture Warranty] will have a qualified repair.

contractor make repairs or modifications to the sealant or flashing as necessary to seal or flash the area from future failure

2 Warrantor [Moisture Warranty] may also at its sole discretion choose to pay the homeowner to have repairs made to the extent of the warranty coverage. A sealant or flashing failure is defined as the inability of a sealant or flashing to adequately prevent excessive moisture from entering into or behind the exterior cladding of the home.

(Terms and Conditions, R p 101) (emphasis added). Lastly, the warranty provided in Section IV (E) subpart 1 the following:

When your request for warranty performance is determined to be a warranted issue, the Warrantor [Moisture Warranty] reserves the right to repair or replace the warranted item or to pay you the reasonable cost of repair or replacement up to the limits of the warranty.

(Terms and Conditions, R p 111) (emphasis added). The terms of the warranty unambiguously provide that Moisture Warranty has the right to make repairs instead of paying money to the home owner.

While the terms of the warranty are plain and unambiguous that Moisture Warranty had the right to make repairs, the Babaees made Moisture Warranty's performance of those terms and obligations under the agreement (repairing the parts of the home covered under the warranty) impossible by refusing to allow Moisture Warranty to actually make repairs. Instead, the Babaees demanded *payment* for the alleged cost of repair.

As the record shows, the Babaees contacted Moisture Warranty about the alleged damage (Babaees' January 3, 2006 Letter R p 978). At trial, Mr. Babae admitted Moisture Warranty was responsive and requested additional information (Tr p 253, R p 516). Moisture Warranty sent an inspector, David Blackburn, to the Babaees house because of the inconsistencies between the Babaees' 2004 Clark report

and Moisture Warranty's earlier inspection (Tr pp 371, 408, Blackburn Report, R pp 633 670 1014) The inspector's report was provided by Moisture Warranty to the Babaees (Tr p 409 R p 671) Additionally Moisture Warranty asked Frank Guidera a repair contractor, to evaluate the range of possible repairs (Tr pp 370-372, R pp 632-634) Mr Guidera went to the Babaees' house as part of this process (Tr p 193, R p 456) Moisture Warranty clearly was attempting to assess the repairs needed on the Babaees house under the terms under the warranty

At trial the following colloquy took place when the president of Moisture Warranty Christopher Burton was testifying

Q And what did Mr Babae do in response to you giving him a copy of the Blackburn Report on February 21, 2006?

A He wanted a check for - I believe at that time he was asking for a check or he wanted money We were trying to get this established so we could determine what repairs actually needed to be done on the home so we could initiate the repairs

Q Did Mr Babae ever give you the opportunity to go to his house and inspect it and continue the warranty process?

A No

Q Mr Babae wouldn't allow you to perform under the terms of the warranty would he?

A We could not - there was no authorization by them to proceed with doing repairs There was an interest in getting money from us and that changed the processing of the claim

(Tr p 409, R p 671)

In sum, the Babaees failed to perform under the contract and denied Moisture Warranty the opportunity to perform its obligation thereunder Therefore, the Babaees waived their right to recover alleged damages from Moisture Warranty for a purported breach of contract Accordingly, the trial court erred in denying Moisture Warranty's motions for directed verdict and judgment notwithstanding the verdict

II THE TRIAL COURT ERRED IN FAILING TO GRANT MOISTURE WARRANTY'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT, AS MOISTURE WARRANTY DID NOT BREACH THE WARRANTY

The trial court committed an error of law in denying Moisture Warranty's motions for directed verdict and judgment notwithstanding the verdict because Moisture Warranty did not breach the warranty. An action for breach of contract seeking money damages is an action at law and the appellate court will correct any error of law upon appellate review. Roberts v Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). As this is a breach of contract action, the Babaees had the burden to prove the contract, its breach, and the damages caused by such breach. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). No breach was proven as is set forth below.

First, the warranty specifically provides in Section II (B) subpart 4 that

Warrantor [Moisture Warranty] will be responsible only for the improvement of the sealant or flashing component and *is not responsible for any damage* that may or may not have been present at or around the specific area of the sealant or flashing failure *before the warranty was in effect*

(Terms and Conditions, R. p. 101) (emphasis added). The Babaees knew of the claimed stucco problems prior to the issuance of the warranty. The Babaees received the Clark Report following the Moisture Mapping Survey on November 8, 2004 (Clark Report November 8, 2004, R. pp. 901-919). This report instructed the Babaees that moisture readings of 20% or above should be addressed (Clark Report November 8, 2004, R. p. 903). The survey included readings of 20% and above including six areas with moisture readings above 25% (Clark Report November 8, 2004, R. pp.

912, 914-915, 919) Twenty-five percent would qualify as excessive moisture under the warranty if it was in effect then (Terms and Conditions R p 101) The Clark Report specifically recommended addressing these areas (Clark Report November 8 2004 R p 903)

On January 3 2006 the Babaees wrote Moisture Warranty stating that Clark s home inspection had conducted a moisture mapping survey of their home and discovered problems (Babaees January 3 2006 letter to Moisture Warranty R p 978) In response to Moisture Warranty s request for more information the Babaees wrote Moisture Warranty on January 11 2006 and included *a portion* of the Clark Report (Babaees' January 11 2006 letter to Moisture Warranty R pp 979 995) The Babaees did not include the portion of the letter stating the date Id Instead they included only Clark s list of qualifications *Clark s recommendations* and *Clark s moisture mapping survey* Id

Clearly the Babaees were attempting to collect from Moisture Warranty for alleged damages that they had knowledge of on November 8, 2004, prior to the closing on November 18, 2004 and prior to the issuance of the warranty on November 29 2004 The very "proof" of moisture problems – the Clark Report – that the Babaees sent Moisture Warranty, was information they had prior to the warranty Therefore under the terms of the warranty the Babaees claims are not covered

Further section II(B)(5) of the warranty states

All claims of failure are limited to \$500 per Moisture Location and up to 40 Moisture Locations per home with a maximum per policy limit of \$20 000 per year or \$60 000 collectively over the full term of the limited warranty

(Terms and Conditions, R p 101) The warranty defines a moisture location as any area equal to or less than 36 inches in diameter with a moisture reading equal to or over 25 percent (Terms and Conditions R p 100)

Pursuant to this provision², Moisture Warranty sent a check for \$2500 to the Babaees (Moisture Warranty Letter from Tim McLain and Check, R pp 1030 1031) This was based on Moisture Warranty's determination under the Blackburn report that there were five "moisture locations " (Tr p 410 R p 672) Under the terms of the warranty payment for moisture locations was limited to \$500 per moisture location (Terms and Conditions, R p 101) Therefore, as the letter explained, the \$2500 was the maximum amount Moisture Warranty could pay the Babaees under the warranty in any event (Moisture Warranty Letter from Tim McLain and Check R pp 1030-1031)

The Babaees may not recover for breach of warranty when no breach has transpired Therefore, the trial court erred in denying Moisture Warranty s motions for directed verdict and judgment notwithstanding the verdict Accordingly this Court should reverse the trial court and direct the entry of judgment in favor of Moisture Warranty

III THE TRIAL COURT ERRED AND PREJUDICED MOISTURE WARRANTY BY FAILING TO ADMIT THE BABAEES' \$110,000 CREDIT TOWARDS THE PURCHASE OF THEIR HOME

When the Babaees purchased their home they received a \$110,000 credit due to the alleged stucco problems The negotiations between the Babaees and the previous home owners was based on the Babaees supposed desire to make repairs and is

² This tendered payment was made after the Babaees prevented Moisture Warranty from repairing the problems

documented by evidence the trial court refused to admit (Memorandum Supporting Post Trial Motions Exhibit C R p 115) A document specifically states that a \$110,000 credit is given to the Babaees for "stucco repairs and replacement " (Tr p 136, R p 399) The Babaees sought this price reduction following receipt of the Clark Report (Tr p 137, R p 400)

The trial court refused to allow Moisture Warranty to argue that the Babaees received this credit at trial (Tr pp 136-156, 480-82 R pp 399-419, 742-744) This error requires judgment for Moisture Warranty The Babaees had already been made whole for any problems by the sellers discounted purchase price They may not recover yet again for this same loss under the Moisture Warranty agreement When this argument was made to the trial court during post trial motions the trial court had not yet reduced the jury s award of \$140,000 through *Nisi Remittitur* As the judgment has now been reduced to \$20 000 a new trial is no longer warranted The \$110 000 offset more than satisfies the \$20 000 judgment from the trial court Therefore upon this Court s finding that the trial court erred by failing to admit and apply the offset evidence judgment should be entered for Moisture Warranty as the trial court s \$20 000 award is extinguished by the \$110,000 offset

Conclusion

Based on the above, this Court should direct the entry of judgment for Moisture
Warranty

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July 29, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A Early III Circuit Court Judge

Case No 2006-CP-40-7215

Fariborz Z Babae and Malihe Babae

Appellants/Respondents

v

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and Preferred Home
Inspections Inc , Defendants

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is

Respondent/Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b)
SCACR

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Inspections Inc

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is

Respondent/Appellant

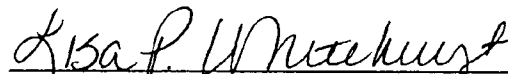
PROOF OF SERVICE

I the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent/Appellant do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail postage prepaid to the following address(es)
Pleadings

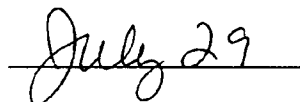
**Final Appellant's Brief of Respondent/Appellant
Moisture Warranty**

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

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RECEIVED

JUL 29 2010

SC Court of Appeals

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Appellants/Respondents,

v

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and Preferred Home
Inspections, Inc., Defendants

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is

Respondent/Appellant

**FINAL RESPONSIVE BRIEF FROM RESPONDENT/APELLANT MOISTURE
WARRANTY**

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STATEMENT OF THE ISSUES

- 1 Did the Trial Court abuse its broad discretion by granting Moisture Warranty's Motion for New Trial *Nisi Remittitur* and reducing the verdict to \$20,000 where the warranty that is the subject of the action was expressly limited to \$20,000 per year the evidence at trial supported the Trial Court's finding that \$20,000 was the proper damages award and the Appellants/Respondents' damages evidence included costs that were clearly not covered by the warranty?
- 2 Have the Appellants/Respondents perfected an appeal as to the Trial Court's grant of directed verdict in favor of Moisture Warranty as to the claim for violation of the Unfair Trade Practices Act?
- 3 In the event an appeal on this issue has been perfected did the Trial Court correctly grant Moisture Warranty's motion for directed verdict as to the Unfair Trade Practices Act claim where the Appellants/Respondents failed to present evidence establishing a violation of the Act and similarly failed to establish causation and damages caused by any violation of the Act?

STATEMENT OF THE FACTS

This case stems from the issuance of a moisture warranty bond in conjunction with the purchase of a home. In late 2004, the Appellants/Respondents Faiborz and Malihe Babae (the Babaees) sought to purchase the home located at 133 Beaver Dam Road Columbia, South Carolina (the house) from Giuseppe and Vittoria Maoli (the Maolis). The house's exterior is clad with an Exterior Insulation Finish System (EIFS) commonly referred to as synthetic stucco (Tr p 504 R p 764). The Maolis originally listed the house for sale at a price of \$935,000, and, after initial negotiations, the parties settled on a sales price of \$810,000 subject to an inspection of the property (Tr pp 245-246, 490, 506-507, R pp 508-509, 751, 766-767). Additionally, as part of the sales contract, the Maolis agreed to pay \$4,095 for a moisture bond warranty on the house (Tr pp 234, 506, Contract of Sale dated 8/29/04 R pp 497, 766, 963).

The Babaees retained Frank Clark of CK Services, Inc. to conduct their pre-closing inspection of the house (Tr p 171, R p 434). On November 3, 2004, Mr. Clark provided the first part of his inspection report which focused on various general deficiencies with the house (CK Services, Inc. Report dated 11/3/04, R p 935). On November 8, 2004, Mr. Clark provided his second inspection report which focused on moisture issues related to the EIFS cladding (CK Services Report dated 11/8/04 R pp 901-919). Based upon issues raised in these inspection reports, the sales price of the house was re-negotiated down to \$700,000¹ (Tr pp 497-500, R pp 758-761).

¹ This was a price reduction of \$110,000. The repairs to the house's general deficiencies amounted to only \$70,000 (Tr pp 174-75, R pp 437-438). Thus, \$40,000 of this price reduction is attributable to moisture related issues with the EIFS cladding.

Due to issues raised by the inspection reports, the closing was delayed and ultimately occurred on November 18, 2004 (Tr pp 248-249 R pp 511-512) As was agreed in the contract of sale as part of the closing the Maolis purchased a MoistureFree Warranty” moisture warranty bond (“the warranty) from Respondent/Appellant Moisture Warranty Corporation (“Moisture Warranty”) on the house for the benefit of the Babaees (Tr pp 234 506, R pp 497 766) Prior to issuing this warranty Moisture Warranty retained Charles Strickland of Preferred Home Inspections Inc to inspect the house (Preferred Home Inspections Report dated 11/12/04 R p 940)

Prior to completing the closing, the Babaees received and signed a Letter of Approval from Moisture Warranty regarding this warranty (Tr pp 247-48 Letter of Approval dated 11/11/04 R pp 510-511 973) The Letter of Approval indicated that the house qualifies for a warranty, and that final approval would occur within ninety days after return of the executed letter and receipt of payment (Letter of Approval dated 11/11/04 R p 973)(emphasis in original) The Letter of Approval expressly provided under the heading of “Level of Warranty Chosen ” that it was a “3-year \$60 000 total limit and \$20,000 annual limit warranty ” (Letter of Approval dated 11/11/04, R p 973) Thus, prior to finalizing their purchase of the house, the Babaees specifically acknowledged that any claims made under this warranty were expressly limited to a maximum of \$20 000 per year for three years with a total limitation of \$60,000 over the three-year term Additionally, by signing the Letter of Approval, the Babaees attested that “[they] have read and understand the Letter of Approval dated 11/11/04 and the Moisture Warranty Terms and Conditions [We] accept the warranty

and any exclusions listed for the home at 133 Beaver Dam Columbia SC 29223 ”
(Letter of Approval dated 11/11/04, R 973)

Following the closing on November 29 2004, Moisture Warranty issued the warranty (Authorization Certificate R p 898) This Authorization Certificate again set forth the warranty s limits of \$20 000 per year and \$60 000 total over the three-year warranty (Authorization Certificate R p 898) Additionally, the Authorization Certificate instructed the Babaees to “Read the Terms and Conditions” and provided instructions for obtaining the Terms and Conditions via request by telephone or download from the internet (Authorization Certificate R p 898) (emphasis in original) The Authorization Certificate further provided that “[t]his limited warranty does not cover consequential or incidental damages ’ (Authorization Certificate, R p 898)

During the first year of the warranty (November 29 2004 to November 29 2005), the Babaees did not file any claims with Moisture Warranty (Tr pp 407-408, R pp 669-670) On January 3, 2006 shortly into the warranty s second year, the Babaees sent a letter to Moisture Warranty indicating their belief that there were moisture problems relating to the house’s EIFS cladding (Letter from Babae to Moisture Warranty dated 1/3/06 R p 978) Upon Moisture Warranty s request for more information, the Babaees provided Moisture Warranty with *a portion* of CK Services November 8, 2004 Report (Tr p 259 Letter from Babae to Moisture Warranty of 1/11/06, R pp 522, 979-995) This was the same report that resulted in the reduction in the ultimate purchase price of the house (Tr pp 497-500, R pp 758-761) Significantly, prior to sending the CK Services Report to Moisture Warranty

Mr Babae attempted to have CK Services change the date of the report but CK Services refused to do so (Tr p 255 R p 518)

In response to this claim, Moisture Warranty retained David Blackburn of Stucco Inspector to inspect the house (Tr pp 370-71, 408, Blackburn Report dated 2/21/06, R pp 632-633, 1014) Mr Blackburn's report confirmed that there were a few areas that needed to be addressed with the house (Tr pp 370-71 408-10, R pp 632-633, 670-672) Moisture Warranty then retained Frank Guidera, a repair contractor, to evaluate the scope of possible repairs (Tr pp 370-72, R pp 632-634) The repairs proposed by Mr Guidera ranged from \$700 to \$9 600 (Tr p 345 R p 608)

Under the terms of the warranty if a failure occurs with regard to the cladding, Moisture Warranty has the option of either hiring a qualified repair contractor to make the repairs, or paying the homeowner to have the repairs "made to the extent of the warranty coverage " (Terms and Conditions at p 4 Tr p 344, R pp 101 607) Additionally the warranty provides that [a]ll claims of failure are limited to \$500 per Moisture Location and up to 40 Moisture Locations per home with a maximum per policy limit of \$20,000 per year or \$60 000 collectively over the full term of the limited warranty " (Terms and Conditions at p 4 R p 101) In accordance with the warranty's limitations and based upon the Blackburn Report, Moisture Warranty identified five separate areas needing repairs (Tr p 410, R p 672) Thus, under the warranty's terms the claim was limited to \$500 per area for a total claim of \$2,500 (Tr p 410 R p 672)

Despite Moisture Warranty's attempts to identify the extent of any moisture issues and to evaluate the appropriate scope of any repairs the Babaees refused to allow Moisture Warranty to perform any repairs on the house (Tr p 345, R p 608). Instead, on April 17, 2006 the Babaees unilaterally asserted that the repairs would exceed \$20,000 and demanded that Moisture Warranty pay them that amount ² (Tr p 409 Letter from Babae to McClain of 4/17/06 R pp 671 1013). In making this demand Mr Babae specifically referenced the CK Services Report, suggesting that the conditions identified in the now fifteen-month-old report were recently 'discovered' (Letter from Babae to McClain of 4/17/06 R p 1013). The Babaees demand for \$20,000 was repeated on April 21, 2006 ³ (Letter from Babae to McClain faxed on 4/21/06, R p 1029).

On or about July 31, 2006, in accordance with terms of the warranty and the results of their inspection, Moisture Warranty sent the Babaees a check for \$2,500 representing payment of \$500 each for the five areas where repairs were determined to be appropriate (Tr p 410 Letter from McClain to Babae (undated) enclosing check dated 7/31/06, R pp 672, 1030-1031). The Babaees did not deposit this check. Instead the Babaees initiated this litigation. No other claims were filed under the warranty and the warranty's three-year term expired on November 29, 2007 (Tr p 440 Order Granting Motion for New Trial *Nisi Remittitur* entered 2/19/09 at p 4 R pp 702, 10).

² In his letter Mr Babae states that he will pay the repair costs exceeding \$20,000 out of his pocket thereby acknowledging the warranty's \$20,000 per year claim limitation.

³ The April 21, 2006 letter also admitted that costs in excess of \$20,000 would be borne by the Babaees.

STATEMENT OF THE CASE

The complaint in this action was filed on December 8, 2006, and asserted claims for (1) fraud, (2) constructive fraud, (3) negligence, (4) negligent supervision, (5) negligent misrepresentation, (6) breach of express warranty, (7) violation of the South Carolina Unfair Trade Practices Act (UTPA), (8) breach of contract, (9) breach of contract accompanied by a fraudulent act, and (10) breach of the covenant of good faith and fair dealing (Complaint, R pp 16-34). A four-day trial was held beginning November 17, 2008, and ending on November 20, 2008. During the trial, all claims with exception of the claims for breach of warranty, UTPA, and fraud were withdrawn by the Babaees (Tr p 542, R p 802). The Trial Court then granted Moisture Warranty's motion for directed verdict as to the claims for UTPA and fraud (Tr pp 553, R p 813).

In granting Moisture Warranty directed verdict as to the UTPA claim, the Trial Court stated:

[t]his case just has not risen to the level of something that is immoral, unethical, or that unfair trade practice or oppressive. I mean, what - - I patiently or impatiently have sat through this thing for three days and it's just a typical breach of warranty case to me.

(Tr p 549, R p 809). The Trial Court went on to conclude:

I just do not think there is any evidence in the record that the Defendant acted with reckless disregard with [sic] truth or falsity and I don't think it rises to the level of conduct which the Unfair Trade Practices Act tries to preclude. So, I am going to direct a verdict on the causes of action for fraud and unfair trade practices.

(Tr p 553, R p 813). Thus, only the breach of warranty claim went to the jury.

The jury returned a verdict for the Babaees on the breach of warranty claim and awarded \$140,000 in damages (Tr p 682 Verdict Form R pp 869 12) The judgment was entered by Form 4 Order on November 21, 2008 (Form 4 Order entered 11/21/08 R p 13)

On November 26, 2008 Moisture Warranty filed its post-trial motions which included a motion for new trial *nisi remittitur*⁴ The Babaees did not file any post-trial motions On January 20 2009, Moisture Warranty filed a memorandum in support of its post-trial motions (Moisture Warranty Corporation's Memorandum in Support filed 1/20/09 R pp 85-92) A hearing on Moisture Warranty's post-trial motions was held on January 21, 2009 Following that hearing on January 23 2009, the Babaees filed a Reply to Moisture Warranty's post-trial motions (Plaintiffs reply to Defendant Moisture Warranty Corp's Post-Trial Motions, R p 117) This Reply does not raise or otherwise address the issue of the Trial Court's granting of directed verdict in favor of Moisture Warranty as to the UTPA claim Similarly the issue of the directed verdict as to the UTPA claim was not mentioned at the hearing on Moisture Warranty's post-trial motions (Transcript from 1/21/09 Hearing, R pp 871-887)

By its Order dated February 16, 2009, the Trial Court granted Moisture Warranty's motion for new trial *nisi remittitur* and denied Moisture Warranty's other post-trial motions⁵ (Order Granting Moisture Warranty Corporations Motion for A New Trial *Nisi Remittitur* dated 2/16/09, R pp 6-11) This Order does not address in any way the Trial Court's prior granting of directed verdict on the UTPA claim in

⁴ Other issues raised by Moisture Warranty in its post trial motions have been raised in Moisture Warranty's appeal in this matter

⁵ The actual filing date of this order is unclear and the order bears a filed stamp dated February 19 2009 but a Form 4 Order attaching the order was filed on February 25 2009

favor of Moisture Warranty. Rather, the Order focused solely on the issues raised by Moisture Warranty. On the issue of new trial *ni si remittitur*, the Trial Court stated:

In this case, after reviewing the evidence, this Court finds that the verdict is "merely excessive" and that the verdict does not bear a reasonable relationship to the injuries sustained by Plaintiffs. First, this Court finds that the total verdict awarded is in excess of any actual damages recoverable under the express terms of the warranty. Pursuant to the express terms of the limited warranty, "Warrantor's [Moisture Warranty Corporation] total aggregate liability of this Limited Warranty is limited to \$20,000 per year and \$60,000 over the full term of the warranty." Thus, the \$140,000 awarded is not reasonably related to the evidence presented to the jury regarding the terms of the warranty. Second, Plaintiff's expert, Chris Cooper, testified regarding costs wholly unrelated and not covered by the warranty, including but not limited to replacing the stucco exterior on parts of the home. As a result, this Court finds that Mr. Cooper's numbers were based on speculation and matters that were not consistent with the coverage provided under the express terms of the warranty.

Under these circumstances, a reduction of the verdict is warranted. As was shown at trial, the Plaintiffs made one claim under the warranty in early 2006. No other claims were submitted under the warranty. Hence, Moisture Warranty Corporation's request to reduce is granted, and the verdict is hereby reduced to \$20,000 or one year of the maximum coverage under the express terms of the warranty.

(Order Granting Moisture Warranty Corporation's Motion for A New Trial *Ni si Remittitur* dated 2/16/09 at p. 4 R. p. 10). The Babaees' counsel acknowledges receiving a copy of this order on February 27, 2009. See Initial Brief of Appellants/Respondents at 5.

On March 5, 2009, the Babaees filed their Notice of Appeal in this matter. The Babaees' Notice of Appeal clearly indicates that it is an appeal solely as to the Trial Court's February 16, 2009 Order granting Moisture Warranty's motion for new trial *ni si remittitur*. The Notice makes no mention of the prior directed verdict as to the UTPA claim or of the Judgment entered on November 21, 2008 following the jury

verdict. Additionally, the only attachments to the Babaees' Notice of Appeal were the February 16, 2009 Order and the Form 4 Order related to that Order filed on February 25, 2009. Moisture Warranty filed its Cross Appeal on March 12, 2009 and amended its Cross Appeal on March 26, 2009. This brief addresses the issues raised by the Babaees' appeal.

ARGUMENT

I THE TRIAL COURT PROPERLY EXERCISED ITS BROAD DISCRETION AND REDUCED THE VERDICT TO \$20,000 WHERE THE WARRANTY AT ISSUE WAS EXPRESSLY LIMITED TO \$20,000 AND THE BABAEES' DAMAGES CLAIMS INCLUDED COSTS CLEARLY EXCLUDED BY THE TERMS OF THE WARRANTY

In his February 16, 2009 Order, Judge Early correctly granted Moisture Warranty's motion for new trial *nisi remittitur* and ordered that the verdict be reduced from \$140,000 to \$20,000. In considering a motion for new trial *nisi remittitur*, the Trial Court has broad discretion to determine that a damages award should be reduced. Rush v. Blanchard, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993) ("The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive.") Daniel v. Sharpe Const. Co., Inc., 270 S.C. 687, 690, 244 S.E.2d 312, 314 (1978) ("Ordinarily, the decision by a trial judge to reduce a verdict he deems excessive is not appealable and will not be disturbed unless it clearly appears that the exercise of his discretion was controlled by manifest error of law.") This is because the trial court is in a better position to judge the evidence. Rush, 310 S.C. at 381, 426 S.E.2d at 806 ("The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this Court.") This holds true even where the reduced award was based

on intangible elements of damages Id at 381, 426 S E 2d at 806 (stating that great deference should be given to the trial court's grant of a new trial *nisi remittitur*, especially in the area of intangible elements of damage) As explained in Daniel v Sharpe Const Co

"The reasonableness of the verdict was challenged before the trial judge and he reduced it. The fact he heard the evidence and was more familiar than we with the evidentiary atmosphere at trial gives him, we think, a better informed view than we have. This is particularly true when the elements of damage are intangibles and the appraisal depends somewhat on an observation of the beneficiaries and evaluation of their testimony."

Id at 690-91 244 S E 2d at 314 (quoting Lucht v Youngblood 266 S C 127 221 S E 2d 854 860 (1976)) Where the trial judge exercises this discretion and invades the province of the jury compelling reasons must be given Bailey v Peacock 318 S C 13 14 455 S E 2d 690 691 (1995)

Here, the Trial Court held that the verdict was excessive and provided the required compelling reasons. Specifically, the Trial Court provided two independent justifications for his reduction of the damages award. First, the verdict was found to be "in excess of any actual damages recoverable under the terms of the express warranty (Order Granting Moisture Warranty Corporations Motion for A New Trial *Nisi Remittitur* dated 2/16/09 at p 4 R p 10). Second, the Babaees' expert Chris Cooper, "testified regarding costs wholly unrelated and not covered by the warranty including but not limited to replacing the stucco exterior on parts of the home." (Order Granting Moisture Warranty Corporations Motion for A New Trial *Nisi Remittitur* dated 2/16/09 at p 4 R p 10). Each of these compelling reasons warrants the affirming of the Trial Court's discretionary decision to reduce the verdict.

A The Trial Court properly reduced the verdict based on the warranty's explicit limitation of \$20,000 per year

In holding that the verdict was in excess of the damages recoverable under the express terms of the limited warranty the Trial Court focused on the fact that "the total aggregate liability of this Limited Warranty is limited to \$20 000 per year and \$60 000 over the full three year term of the warranty " (Order Granting Moisture Warranty Corporations Motion for A New Trial *Nisi Remittitur* dated 2/16/09 at p 4 R p 10) Because only one claim the January 2006 claim was ever filed the maximum possible recovery was \$20 000 and the Trial Court accordingly reduced the verdict to that amount Id

In their Brief the Babaees assert that this ruling is inconsistent with a prior ruling denying arbitration based on an arbitration clause in Moisture Warranty s Terms and Conditions See Initial Brief of Appellants/Respondents at 18-19 The Babaees contend that there was no evidence that the Babaees ever received the Terms and Conditions Id However the Trial Court s prior ruling on arbitration⁶ and the issue of whether the Babaees ever received the Terms and Conditions are both immaterial to the issue of whether *nisi remittitur* was properly granted

Prior to the issuance of the warranty and prior to the Babaees actually purchasing the house they both specifically acknowledged that the warranty was (a) limited to three years, (b) limited to \$20,000 per year and (c) limited to a total amount of \$60,000 over the three year term Specifically prior to completing the closing, the Babaees received and signed a Letter of Approval from Moisture Warranty which

⁶ The Trial Court s Order denying arbitration was limited solely to the issue of arbitration and has no bearing on this issue (Order Denying Moisture Warranty Corporations Motion to Stay Discovery and Compel Arbitration filed 10/1/07 R p 2)

expressly provided under the heading of "Level of Warranty Chosen " that it was a "3-year \$60 000 total limit and \$20,000 annual limit warranty " (Letter of Approval dated 11/11/04, R p 973) (emphasis in original) By signing this document prior to the purchase of the warranty and prior to the completion of the closing on the house the Babaees acknowledged and accepted these warranty limitations ⁷ Any claim by them that they had no prior knowledge of these key terms is baseless

In addition to the fact that the warranty limits were clearly disclosed on the Letter of Approval the warranty's formal Terms & Conditions are also controlling despite the Babaees assertions that they were unaware of them When a contracting party is in position to learn the contents of the paper and thus fully to protect himself by reading it or having it read then the party is bound by the contract Maw v McAlister, 252 S C 280, 166 S E 2d 203 (1969) J B Colt Co v Britt, 129 S C 226, 123 S E 845 848 (1924) Above the Babaees signatures the Letter of Approval states "*I have read and understand this Letter of Approval dated 11/11/04 and the Moisture Warranty Terms and Conditions I accept the warranty and any exclusions listed for the home at 133 Beaver Dam, Columbia, SC 29233* " (Letter of Approval R p 973) (emphasis in the original) Additionally, on November 29, 2004 the Babaees were issued an Authorization Certificate as to the warranty which again set forth the warranty's limits of \$20,000 per year and \$60,000 total over the three-year warranty (Authorization

⁷ Significantly at the time that the motion to compel arbitration was considered by the Trial Court discovery had not been conducted and Moisture Warranty did not have the Letter of Approval (Tr p 146 281 282 R pp 409 544 545) In addition to expressly stating the policy limits the Letter of Approval signed by the Babaees also stated that "[they] have read and understand the Letter of Approval dated 11/11/04 and the Moisture Warranty Terms and Conditions [We] accept the warranty and any exclusions listed for the home at 133 Beaver Dam Columbia SC 29223 " (Letter of Approval dated 11/11/04 R p 973)

Certificate R p 898) This Authorization Certificate instructed the Babaees to “Read the Terms and Conditions” and provided instructions for obtaining the Terms and Conditions via request by telephone or download from the internet (Authorization Certificate, R p 898) (emphasis in original)

Further, Mr Babae is a successful business owner and is clearly not an ignorant party to a contract (Tr p 226 R p 489) Stanley Smith & Sons v D M R Inc 307 S C 413, 417 415 S E 2d 428, 431 (Ct App 1992) (noting an exception to the rule binding a party to a contract when the party is ignorant and unwary) The Babaees had multiple opportunities to review the terms and conditions of the contract

First the President of Moisture Warranty testified it is Moisture Warranty’s normal course of business to send the terms and conditions of the warranty to the home buyer prior to closing (R Tr pp 411-412, R pp 673-674) Second in a letter to Realtor Buddy Lewis Mr Babae lists problems with the stucco and requests to receive and review the Moisture Warranty bond prior to closing (Tr p 227 Letter from Babae to Lewis dated 11/8/04, R pp 490, 972) Third, the brochure the Babaees heavily rely on in their brief states that repairs will be made to the house “based on the terms of the warranty” (Brochure R p 925) (emphasis added) Lastly Realtor Lewis testified he instructs home buyers to call the warranty company for details about the warranty (Tr p 511, R p 771) Accordingly it was reasonable for the Trial Court to conclude, based on this evidence that the Babaees either received the Terms and Conditions or, at the very least, knew of their existence and their ability to review them but chose not to avail themselves of that opportunity Thus *in addition*

to the warranty limitations explained in the Letter of Approval the Babaees were also on notice of these limitations by virtue of the Terms and Conditions themselves

The Trial Court, having viewed all of this evidence, concluded that the warranty that was the subject of the Babaees' breach of warranty claim was clearly limited to \$20,000 per year. Thus because the Babaees filed only one claim their maximum possible recovery, regardless of how their damages are characterized⁸ is \$20,000. Therefore the Trial Court correctly determined that the jury verdict of \$140,000 was excessive, and properly exercised its discretion to reduce the jury award to the policy limit of \$20,000.

B The Trial Court properly reduced the verdict based on the Babaees' expert's inclusion of repairs clearly outside the scope of the warranty, and the existence of evidence supporting the court's conclusion that \$20,000 was the proper damages amount

As an alternate ground for granting new trial *nisi remittitur* the Trial Court reduced the damages award to \$20,000 based upon the fact that the damages sought by the Babaees included "costs wholly unrelated and not covered by the warranty including but not limited to replacing the stucco exterior on parts of the home" (Order Granting Moisture Warranty Corporations Motion for A New Trial *Nisi Remittitur* dated 2/16/09 at p. 4, R. p. 10). Specifically the Babaees based their damages on the removal and replacement of the stucco⁹. This was simply not part of the bargain and exchange. Moisture Warranty and the Babaees agreed to a warranty with a \$20,000

⁸ In their Initial Brief the Babaees assert that the Trial Court erred in characterizing their damages as "actual" damages rather than "consequential" damages (Initial Brief of Appellants/Respondents at 22). However the \$20,000 per year limitation to the warranty applies no matter how the damages are characterized. Additionally the Authorization Certificate issued on November 29, 2004 provided that "[t]his limited warranty does not cover consequential or incidental damages" (Authorization Certificate R. p. 898).

⁹ The Babaees' expert Chris Cooper testified that it would cost \$201,416 to re-clad the house as well as an additional \$16,000 for unknown damage (Tr. pp. 63-64 R. pp. 326-327).

annual limit and total limit of \$60 000. Additionally, the Terms and Conditions specifically exclude structural defects from the warranty (Terms and Conditions pp 4-5 R pp 101-102). However, at trial, the Babaees sought damages based on desired *structural alterations* to their house rather than moisture related repairs.¹⁰ The Trial Court saw that the Babaees' expectations and the jury's award far exceeded the express limited terms of the warranty, and properly granted the new trial *nisi remittitur* based on the actual evidence.

Additionally, the evidence at trial showed various estimates related to different repairs referred to by the Babaees in their demand for \$20 000 from Moisture Warranty (Letter from Babae to McClain dated 4/17/2006 R p 1013). The Babaees' original demand was for \$20 000, which is an indicator as well that they understood the maximum potential coverage amount under the warranty bargained for by the parties. The Trial Court heard and saw the various testimony concerning the claimed damages. This Court should not interfere with the Trial Court's broad discretionary conclusion that \$20 000 was the proper amount of damages based upon the evidence before it.¹¹

¹⁰ The Babaees' expert stated that he recommends a strip and reclad whenever vapor retarders are present as they are on the Babaees' house (Nov 17 Tr p 92 R p 198). The presence of the vapor retarders goes to the construction of the house, not moisture intrusion after the house was completed. Therefore, the basis for the Babaees' desire to strip and reclad the house with new stucco for an estimated cost of over \$200 000 arises from a disagreement with the way the house was constructed, not with the warranty (Tr p 63 R p 326).

¹¹ This argument is made while expressly reserving Moisture Warranty's arguments in its own appeal that it should have been awarded judgment.

II THE BABAEES HAVE NOT APPEALED FROM THE TRIAL COURT'S DIRECTED VERDICT AS TO THE UTPA CLAIM, AND, EVEN IF SUCH AN APPEAL HAS BEEN PROPERLY TAKEN, DIRECTED VERDICT IN FAVOR OF MOISTURE WARRANTY WAS PROPER BECAUSE THERE WAS NO VIOLATION OF THE ACT, NO CAUSATION, AND NO DAMAGES

A The Babaees failed to appeal the Trial Court's directed verdict in favor of Moisture Warranty as to the UTPA claim

Under South Carolina Appellate Court Rule 203(b)(1) "[a] Notice of Appeal must be served within thirty days after written notice of the entry of the order or judgment " S C App Ct R 203(b)(1) Prior to submitting the case to the jury, the Trial Court granted Moisture Warranty s motion for directed verdict as to the UTPA claim (Tr pp 542-43 R 802-803) This grant of directed verdict became appealable by the Babaees after the entry of the judgment on November 21, 2008 (Form 4 Order filed on 11/21/08, R p 13) The time period for filing an appeal on this issue was stayed by Moisture Warranty s filing of its post-trial motions on November 26 2008 S C App Ct R 203(b)(1) (providing that the time for appeal by all parties is stayed by the filing of a Rule 59, SCRCR motion) The thirty-day time period in which to perfect an appeal began to run again following the Babaees' receipt of the Order addressing Moisture Warranty's post-trial motions on February 27 2009

While the Babaees did file a timely Notice of Appeal on March 5 2009 this notice did not appeal the directed verdict as to the UTPA claim Rather, the Babaees Notice of Appeal was limited to only the February 16, 2009 Order granting Moisture Warranty s motion for new trial *nisi remittitur* See Notice of Appeal filed 3/5/09 (R 124) (stating that it is an appeal of the Order dated February 16 2009 and making no mention of or reference to the November 21 2008 Judgment) Moisture Warranty's

post-trial motions do not address the directed verdict granted *in its favor* as to the UTPA claim and the Babaees did not raise any issue relating to the directed verdict ruling during the January 21, 2009 hearing or in their January 23 2009 Reply. Finally, the February 16 2009 Order makes no reference whatsoever to the directed verdict ruling. Thus an appeal of the February 16, 2009 order is not an appeal of the prior directed verdict. To perfect such an appeal, the Babaees were required to include specific reference to the November 21, 2001 Judgment. See S C App Ct R 203(e)(1)(C) (requiring that the Notice of Appeal contain “[t]he date of the order judgment or sentence from which the appeal is taken”)

An appellate court will not consider issues on appeal which have not been preserved for appellate review. *Ulmer v Ulmer*, 369 S C 486 490 632 S E 2d 858 861 (2006) (holding that where the party’s notice of appeal was limited to specific orders by the trial court, no appeal was taken from a separate earlier order). “A portion of a judgment that is not appealed presents no issue for determination by the reviewing court.” *Austin v Specialty Transp Services, Inc* 358 S C 298 320 594 S E 2d 867, 878 (Ct App 2004). The Babaees failed to file a timely appeal as to the directed verdict on the UTPA claim encompassed in the November 21 2008 Judgment, and the inclusion of this issue in their initial brief is, therefore improper.

B The Trial Court properly granted Moisture Warranty’s motion for directed verdict as to the UTPA claim

Even if the Babaees have properly appealed this issue the Trial Court’s granting of directed verdict as to the UTPA claim was proper and should be affirmed. In reviewing a directed verdict, this Court “must determine whether a verdict for the party

opposing the motion would have been reasonably possible under the facts ” Hanahan v Simpson 326 S C 140 149 485 S E 2d 903 908 (1997) When an appellate court finds no such reasonable possibility the grant of the directed verdict should be affirmed Id Speculative, theoretical and hypothetical views do not constitute a reasonable possibility and those views should not be submitted to a jury Id

In order to establish a UTPA claim the Babaees were required to establish that “(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce (2) the unfair or deceptive act affected public interest, and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive act(s) ” Austin v Stokes-Craven Holding Corp 387 S C 22 50 691 S E 2d 135 149 (2010), Wright v Craft, 372 S C 1 640 S E 2d 486, 498 (Ct App 2006) S C Code Ann §§ 39-5-10 to -560 The primary element is a violation of the Act Section 39-5-20(a) defines such a violation as “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce ” Stated differently “[a]n unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive ” Wogan v Kunze, 366 S C 583 606 623 S E 2d 107 120 (Ct App 2005) deBondt v Carlton Motorcars, Inc, 342 S C 254, 269 536 S E 2d 399 407 (Ct App 2000) Therefore it was the Babaees burden to establish the Moisture Warranty engaged in some “unfair or deceptive acts or practices ” S C Code Ann §§ 39-5-20(a), 39-5-140 The Babaees failed to meet this burden and correspondingly, failed to establish the remaining elements of damages proximately caused by a violation of the Act Thus, the Trial Court’s grant of directed verdict as to the UTPA claim was proper

1 The Trial Court correctly held that there was no violation of the Act

The dispute in this case centered entirely on the meaning and effect of the warranty. The Babaees, however, attempted to manipulate a garden variety breach of warranty case into a UTPA claim. In support of this claim, the Babaees assert that Moisture Warranty's guarantee of a "dry" home was deceptive. See Appellants'/Respondents' Initial Brief at pp. 15-16. The facts established at trial belie this assertion.

First, the Babaees misconstrue the meaning of the term "dry." Dry is defined as "free or relatively free from a liquid." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 384 (11th ed. 2003). No matter what exterior is used on a home, there is no such thing as a completely "dry" home. In CK Services, Inc.'s (the Babaees' inspector) November 8, 2004 report, it states that "[i]t is generally accepted that wood when removed from kiln has 19% moisture content." (CK Services Report dated 11/8/04 at p. 3, R. p. 903). Thus, Moisture Warranty's reference to the term "dry" in its brochure cannot reasonably be equated to a guarantee of a completely "dry" home. Rather, it is at most "puffing" or sales talk. Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (affirming dismissal of UTPA claim because the "alleged representations were 'puffing' or sales talk permitted by law and on their face were not unfair trade practices."); Clarkson v. Orkin Exterminating Co., Inc., 761 F.2d 189 (4th Cir. 1985) (applying South Carolina's UTPA and holding that "[a] statutory prohibition of deceptive practices simply does not reach expected puffing of a vendor's product").

Additionally there was nothing unfair or deceptive about Moisture Warranty's conduct. Moisture Warranty's brochure states that "[f]rom our years of experience, we know what steps to take to assure homeowners that their home is dry and we guarantee their home will remain dry during the term of the warranty or we'll pay to get it dry." (Moisture Warranty Brochure R p 924) Moisture Warranty complied with this promise. Upon receiving the Babaees' claim, Moisture Warranty retained David Blackburn of Stucco Inspector to inspect the house. (Tr pp 370-371 408 Blackburn Report dated 2/21/06, R pp 632-633 670 1014) After Mr. Blackburn confirmed that there were areas requiring repairs, Moisture Warranty retained a repair contractor Frank Guidera to evaluate the possible scope of repairs. (Tr pp 370-372 R pp 632-633) The Babaees, however, refused to allow Moisture Warranty to perform any repairs. (Tr pp 345, 409 R pp 608 671) Instead, the Babaees demanded that Moisture Warranty pay them the \$20,000 maximum annual claim amount. (Tr p 409, R p 671) Since the Babaees refused to allow them to make any repairs, Moisture Warranty offered them \$2,500 representing the \$500 per area warranty limit for the five areas where repairs were determined to be necessary. (Tr p 410, Letter from McClain to Babae (undated) enclosing check dated 7/31/06 R pp 672, 1030-1031) Thus, Moisture Warranty did take steps to repair the house and to pay for repairs to the house.

The Babaees also dispute the moisture level set by Moisture Warranty to trigger a repair. The warranty's terms and conditions define a "Moisture Location" as an area with a moisture reading equal to or greater than twenty-five percent. (Terms and Conditions p 3, R p 100) As the president of Moisture Warranty testified at trial

Moisture Warranty may repair an area that has not reached a moisture level of twenty-five percent if Moisture Warranty believed the repairs were needed (Tr pp 359-360, R pp 621-622) The level of twenty-five percent was reached from experience and review of multiple studies (Tr pp 375-376, R pp 637-638) Damage begins to occur at twenty-eight percent (Tr pp 386-387, 590 R pp 648-649, 842) Moisture Warranty's use of twenty-five percent as a benchmark is neither deceptive nor unfair

The dispute in this case is whether Moisture Warranty lived up to the terms of its warranty Moisture Warranty's position was that there were five areas needing repairs and they would have those areas repaired When the Babaees refused to permit this Moisture Warranty offered to pay the Babaees \$500 per area as per the limitations of the Warranty The Babaees' initial position was that the necessary repairs exceeded \$20,000, and that Moisture Warranty was required to tender the annual maximum claim amount of \$20,000 to them It is not truly a dispute as to whether Moisture Warranty engaged in any unfair or deceptive act As recognized by the Trial Court

This case just has not risen to the level of something that is immoral unethical or that unfair trade practice or oppressive I mean - - I patiently or impatiently have sat through this thing for three days and its just a typical breach of warranty case to me

I don't think it rises to the level of conduct which the Unfair Trade Practices Act tries to preclude

(Tr pp 549, 553, R pp 809, 813) Because there was no unfair or deceptive act there could be no violation of the Unfair Trade Practice Act Camp v Springs Mortgage Corp 310 S C 514 518 426 S E 2d 304 306 (1993) (finding the complaint insufficient to state an Unfair Trade Practices violation because no unfair or

deceptive act was alleged) Therefore, the Trial Court properly granted Moisture Warranty directed verdict as to this claim and this ruling should be affirmed

2 The Babaees' assertion that capability of repetition is sufficient to establish a violation of the Act is incorrect

In their Brief the Babaees incorrectly contend that the mere fact that an act is capable of repetition is "sufficient" to elevate that act to a violation of the UTPA. Contrary to the Babaees' contention, the fact that an act is capable of repetition does not satisfy the primary requirement of the UTPA that there be some violation of the Act. Capability of repetition instead goes to the issue of whether an unfair or deceptive act affects the public interest. Noack Enterprises Inc v Country Corner Interiors of Hilton Head Island, Inc., 290 S C 475, 480, 351 S E 2d 347 351 (Ct App 1986). First there must be "an unfair or deceptive act in the conduct of trade or commerce." Wright v Craft 372 S C at 23 640 S E 2d at 498. Only after this primary element is met does the court consider the separate and independent element of whether the public interest is affected. Showing that an act is capable of repetition has no bearing on whether that act is unfair or deceptive.

3 The Babaees have also failed to establish any damages proximately caused by a violation of the Act

Absent a violation of the Act the elements of causation and damages cannot be met. However, even if there was a violation of the Act, the grant of directed verdict was proper because the Babaees failed to establish any damages proximately caused by the alleged violation of the Act. Moisture Warranty's terms and conditions state that it may repair or pay the homeowner for areas of moisture. (Terms and Conditions, R pp 101, 111). The Babaees refused to allow Moisture Warranty to perform repairs

and refused to accept payment in accordance with the warranty's terms¹² (Tr pp 345, 409-10 R pp 608 671-672) Any damages suffered by the Babaees were the direct result of their refusal to allow Moisture Warranty to perform under the Warranty

The Trial Court properly concluded that there was no violation of the Act. Additionally, any damages to the Babaees were caused not by Moisture Warranty's attempts to fulfill its obligations under the warranty but rather by Babaees' own actions in attempting to deceive Moisture Warranty by passing off the CK Services Report as new and in refusing to allow Moisture Warranty to perform repairs or make payments in accordance with the warranty's terms. Thus the grant of directed verdict as to the UTPA claim was proper and should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the Trial Court's grant of New Trial *Nisi Remittitur* and reduction of the verdict amount to \$20,000. Additionally, the Court should affirm the Trial Court's grant of directed verdict in favor of Moisture Warranty as to the Unfair Trade Practices claim because the Appellants/Respondents have not properly appealed this ruling, and alternatively, the directed verdict as to this claim was properly granted.

Signature Page Attached

¹² Again, Moisture Warranty makes this argument and request specifically preserving all of its arguments in its own appeal wherein it argues it was entitled to judgment.

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July 29, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A Early III, Circuit Court Judge

Case No 2006-CP-40-7215

Fariborz Z Babae and Malihe Babae, Appellants/Respondents,

v

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and Preferred Home
Inspections Inc Defendants

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is

Respondent/Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Responsive Brief complies with Rule
211(b), SCACR

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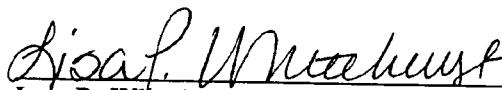
PROOF OF SERVICE

I the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP attorneys for Respondent/Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail postage prepaid, to the following address(es)
Pleadings

**Final Responsive Brief of Respondent/Appellant
Moisture Warranty**

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SC Court of Appeals

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Respondent/Appellant

**FINAL REPLY BRIEF FROM RESPONDENT/APPELLANT
MOISTURE WARRANTY**

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ARGUMENT

This case stems from the issuance of a moisture warranty bond by Respondent/Appellant Moisture Warranty Corporation ("Moisture Warranty") to Appellants/Respondents Faiborz and Malihe Babae ("the Babaees") in conjunction with their purchase of a home. At trial the jury returned a verdict of \$140,000 against Moisture Warranty on the Babaees' claim for breach of warranty.¹ (Complaint, Tr. p. 682, Verdict Form, R. pp. 16, 869, 12). The Trial Court then granted Moisture Warranty's motion for new trial *nisi remittitur* and reduced the verdict amount to \$20,000 (Order granting Moisture Warranty Corporation's Motion for A New Trial *Nisi Remittitur* dated 2/16/09, R. p. 7). Moisture Warranty has appealed the denial of its motions for directed verdict and judgment notwithstanding the verdict ("JNOV") as to the breach of warranty claim as well as the Trial Court's exclusion of evidence relating to a purchase credit the Babaees received compensating them for moisture damage existing at the time they purchased the home (Moisture Warranty's Amended Notice of Cross Appeal, R. p. 132).

In their Responsive Brief as to Moisture Warranty's appeal, the Babaees incorrectly contend that an early ruling by the Trial Court limited solely to the issue of arbitration resulted in a final determination of fact that there were no "Terms and Conditions" applicable to the warranty. The Babaees further contend that the record

¹ The complaint in this action asserted claims for (1) fraud (2) constructive fraud (3) negligence (4) negligent supervision (5) negligent misrepresentation (6) breach of express warranty (7) violation of the South Carolina Unfair Trade Practices Act ("UTPA") (8) breach of contract (9) breach of contract accompanied by a fraudulent act and (10) breach of the covenant of good faith and fair dealing (Complaint, R. pp. 16-34). During the trial, all claims with exception of the claims for breach of warranty, UTPA, and fraud, were withdrawn by the Babaees (Tr. p. 542, R. p. 802). The trial court granted Moisture Warranty's motion for directed verdict as to the UTPA and fraud claims, sending only the breach of warranty claim to the jury (Tr. p. 553, R. p. 813).

does not support the fact that they negotiated a \$40 000 reduction in the purchase price of the home which compensated them for then-existing moisture damage and related conditions. Both of these arguments should fail and judgment in favor of Moisture Warranty should be granted on the warranty claim based both upon the clear terms of the warranty as well as the fact that the Babaees had previously been fully compensated in an amount in excess of the Trial Court's final judgment.

I THE TRIAL COURT ERRED BY FAILING TO GRANT MOISTURE WARRANTY DIRECTED VERDICT AND/OR JNOV ON THE BREACH OF WARRANTY CLAIM

A The Trial Court's ruling on the issue of arbitration was limited solely to the issue of arbitration, and did not conclusively determine any issues as to the other terms and conditions applicable to the warranty

Throughout their Responsive Brief, the Babaees incorrectly contend that Judge Cooper's preliminary arbitration ruling forever decided whether the Babaees were subject to any of the terms and conditions of the warranty. The Babaees erroneously argue that Judge Cooper's denial of Moisture Warranty's motion to compel arbitration stripped the Trial Court of its power to issue a directed verdict or JNOV on the breach of warranty claim even though the evidence at trial established the Babaees' notice of terms and conditions, Moisture Warranty's compliance with those terms, and the Babaees' non-compliance with the terms. The Trial Court's early ruling on the specific issue of arbitration had no bearing or effect on these factual issues.

The Trial Court had the power to grant a directed verdict or JNOV on the breach of warranty claim because a court's decision regarding an arbitration clause in a warranty contract is separate and apart from any determinations regarding the warranty.

as a whole “An arbitration clause s validity is distinct from the substantive validity of the contract as a whole New Hope Missionary Baptist Church v Paragon Builders, 379 S C 620, 630, 667 S E 2d 1, 6 (Ct App 2008) (holding that disputing the enforceability of the contract as a whole does not raise the issue of the enforceability of the arbitration clause) see also Housing Authority of City of Columbia v Cornerstone Housing LLC, 356 S C 328, 338, 588 S E 2d 617, 622 (Ct App 2003) (“Arbitration clauses are separable from the contracts in which they are imbedded The issue of the arbitration clause’s validity is distinct from the substantive validity of the contract as a whole ”) (internal citations omitted) Our courts have consistently held that a determination regarding arbitration is separate and apart from a determination regarding the terms of the contract Therefore Judge Cooper’s ruling regarding arbitration was not binding on the Trial Court except solely on the issue of arbitration

Simply put the Babaees are attempting to expand Judge Cooper s limited arbitration ruling to envelope the entire case To do this, the Babaees improperly rely on Enoree Baptist Church v Fletcher, 287 S C 602 340 S E 2d 546 (1986) for the proposition that one circuit court judge cannot set aside the order of another That is a correct proposition of law, but it does not apply to these circumstances Essentially the Babaees assert that under this rule the Trial Court cannot revisit any issues including issues of fact, that relate to the prior order of the Trial Court This however is not the effect of the rule In Enoree, the initial trial court judge granted the plaintiff’s motion to file an amended complaint Id at 603 340 S E 2d at 547 The case ended in a mistrial Id When the case was tried a second time, the second trial court refused to allow the plaintiff to proceed on the amended complaint despite the

initial trial court ruling on that issue Id at 603-04, 340 S E 2d at 547 The Supreme Court held that the effect of the second trial court's order was to reverse the earlier substantive order which is impermissible Id at 604 340 S E 2d at 547

This is not the situation here If the Trial Court had granted Moisture Warranty's motions for directed verdict or JNOV on the breach of warranty claim, this would not have affected Judge Cooper's arbitration ruling in any way There would be no "setting aside" of the arbitration ruling The grant of directed verdict or JNOV would not have resulted in a compelled arbitration The fact that all evidence is not available and the record is undeveloped at the early stage of a motion to compel arbitration also supports this conclusion Therefore, these rulings are distinct and a court's preliminary ruling on arbitration does not affect the trial court's ability to rule on the contract and its terms as established by the evidence at trial

The Babaees note that Moisture Warranty did not appeal the Arbitration Order While this is accurate, it has no bearing on whether factual issues were conclusively determined in such an order It was Moisture Warranty's decision whether to appeal or abandon the legal issue of arbitration By abandoning it, the legal determination became the law of the case But even in a law of the case analysis, if the facts are different when revisited, such that the principles of law announced earlier are not applicable the prior decision is not conclusive Cohen v Standard Acc Ins Co, 203 S C 263, 274, 17 S E 2d 230 234 (1941) (addressing law of the case and holding that where there are material changes in the evidence, pleadings or findings, a prior decision is not conclusive upon questions presented in a subsequent appeal)

The arbitration order in question was issued at an early stage of this action prior to the parties engaging in discovery (Tr pp 146 281-82 R pp 409 544-545) Review of the order itself shows that Judge Cooper carefully worded the order to avoid making any conclusive findings of fact at this early stage A finding of fact is defined as “[a] determination by a judge jury, or administrative agency of a fact supported by the evidence in the record ” BLACKS LAW DICTIONARY 646 (7th ed 1999) No such findings exist in Judge Cooper s ruling Judge Cooper based his preliminary ruling on allegations – not findings Specifically Judge Cooper’s order states

At the time of the Plaintiffs’ purchase of the Moisture Free Warranty they allege they had not [been] provided with any document claiming the Warranty was subject to arbitration Allegedly, Plaintiffs did not receive either the Certificate or the information booklet until after they purchased the MoistureFree Warranty

(emphasis added) (Order Denying Moisture Warranty Corporation’s Motion to Stay Discovery and Compel Arbitration filed 10/1/07 (“Arbitration Order ” p 2 R p 3) Judge Cooper later states, “[a]llegedly, the only documents Plaintiffs received prior to their purchase of the MoistureFree Warranty were advertising and marketing materials produced by Moisture Warranty Corp ” (emphasis added) (Arbitration Order p 4 R p 5) In denying the motion to compel arbitration, Judge Cooper noted that, at the time of that hearing, “[Moisture Warranty] has failed to produce competent evidence” supporting the assertion that the Babaees had notice of the Arbitration provision in the warranty s terms and conditions (Arbitration Order p 3 R p 4)

In the Arbitration Order, Judge Cooper made a legal ruling based on the evidence then before the Trial Court He did not make a conclusive ruling of fact as to the terms of the contract, and he did not make a factual determination amounting to a

conclusion as to whether the Babaees' statements were true. Instead, he specifically noted that the Babaees' assertions as to the facts were merely allegations, and he based his legal conclusion regarding arbitration upon the lack of evidence at that time to the contrary. This issue did not foreclose Moisture Warranty's ability, after the completion of discovery, to later prove the terms of the contract at trial.²

Even if this Court were to interpret Judge Cooper's cautious statements in the Arbitration Order as "findings of fact," this Court is not bound by those "findings" because under the developed record, they are clearly erroneous. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999) (holding that while deference is given to a circuit judge's findings of fact when deciding an arbitration motion, the factual findings underlying that conclusion may be overruled where there is no evidence reasonably supporting them); see also City of Chester v. Addison, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981) (stating that factual findings of a lower court made in preliminary motions may be overruled where they are clearly wrong). As illustrated in the following section, the evidence offered at trial shows that the Babaees were on notice of the terms and conditions relating to the warranty at issue. Therefore, neither the Trial Court, nor this Court, are bound by any preliminary factual determinations made by Judge Cooper prior to the discovery and admission of all evidence at trial. Further, based on the actual evidence before the Trial Court, directed verdict or JNOV was proper on the breach of warranty claim.

² Significantly, at the time that Moisture Warranty raised the issue of arbitration, it was precluded from engaging in discovery because to do so would have resulted in a waiver of its right to compel arbitration. Rhodes v. Benson Chrysler Plymouth, Inc., 374 S.C. 122, 124, 647 S.E.2d 249, 250 (Ct. App. 2007) (holding that a party waives its right to enforce an arbitration provision when it delays in demanding arbitration and engages in discovery).

B The evidence at trial established that the Babaees were on notice of the terms and conditions relating to the warranty and that Moisture Warranty complied with those terms and conditions

In contrast to the limited evidence available at the time of Judge Cooper's Arbitration order, at trial substantial evidence was admitted regarding whether the Babaees had notice of and agreed to the warranty's terms and conditions. Importantly, Judge Cooper's denial of Moisture Warranty's motion to compel arbitration occurred prior to Moisture Warranty identifying the Letter of Approval relating to this warranty (Tr pp 146, 281-282, R pp 409, 544-545). This Letter of Approval was dated November 11, 2004, and was signed by both of the Babaees prior to their completing the closing on the home (Letter of Approval Tr pp 247-248, R pp 973, 510-511). Directly above their signatures, the Letter of Approval states "*I have read and understand this Letter of Approval dated 11/11/04 and the Moisture Warranty Terms and Conditions. I accept the warranty and any exclusions listed for the home at 133 Beaver Dam, Columbia, SC 29233*" (Letter of Approval R p 973) (emphasis in the original). When a contracting party is in a position to learn the contents of the paper and thus fully to protect himself by reading it or having it read, then the party is bound by the contract. Maw v McAlister, 252 S C 280, 166 S E 2d 203 (1969). J B Colt Co v Britt, 129 S C 226, 123 S E 845, 848 (1924). Therefore, the Babaees agreed to the terms and conditions of the warranty and the terms of the warranty apply to this case.

In addition to their signatures on the Letter of Approval, other evidence admitted at trial established that the Babaees received the terms and conditions prior to the purchase of the warranty. Moisture Warranty's president testified that it is

Moisture Warranty's normal course of business to send the terms and conditions of the warranty to the home buyer prior to closing (Tr pp 411-412 R pp 673-674) Further the August 29 2004 sales contract for the house signed by Mrs Babae, included a provision that the home sellers would pay at closing for a moisture bond warranty (August Contract, R p 961) In their Responsive Brief the Babaees belittle the relevancy of this fact however the date the Babaees became aware of the moisture warranty is very relevant From as early as August 29 2004, the Babaees knew a moisture bond warranty would be provided on the house they were purchasing Next the Babaees actively sought review of the warranty as shown in a letter written by Mr Babae to the realtor Buddy Lewis on November 8, 2004 which stated that the warranty must be received and reviewed by the Babaees prior to closing (Tr p 232 Letter from Babae to Lewis dated 11/8/04 R pp 495, 972) Significantly the Babaees sent this letter demanding review of the Warranty's terms prior to signing the Letter of Approval acknowledging that they had read and understood the terms and conditions of the warranty It is nonsensical that a party who actively sought review of the warranty would sign the Letter of Approval without first seeing the terms

In their Responsive Brief, the Babaees argue that the realtor, Buddy Lewis testified that the Babaees did not receive the terms of the warranty However, Lewis merely testified he did not know if the Babaees received the terms (Tr p 510, R p 770) Lewis explained, like with a termite bond he tells his buyers to contact the warranty company and ask the company any questions (Tr p 511 R p 771) Further Moisture Warranty's president testified that Moisture Warranty sends the terms and conditions to the home purchaser along with the Authorization Certificate

because Moisture Warranty does not rely on the realtor providing information to the home purchaser (Tr pp 411-412 R pp 673-674)

The Letter of Approval also stated, “[s]ign and return this form to activate coverage Once [Moisture Warranty] receives this in writing (and payment is processed), the warranty will be issued ” (Letter of Approval R p 973) (emphasis in original) In accordance with the language in the Letter of Approval, on November 29, 2004 Moisture Warranty issued the Authorization Certificate to the Babaees stating that the limited warranty began on November 29, 2004 and ends November 29 2007 (Authorization Certificate R p 898) This certificate instructed the Babaees to “Read the Terms and Conditions” and provided instructions for obtaining the Terms and Conditions via request by telephone or download from the internet (Authorization Certificate R p 898) (emphasis in original) Further, the president of Moisture Warranty testified the terms and conditions would be included with the Authorization Certificate (Tr p 412, R p 674) Therefore the record shows the Babaees were aware of the terms actively sought review of the terms, and agreed to the terms of the warranty Following receipt of the Authorization Certificate in 2004, which on its face provides instructions on how to obtain the terms the Babaees did not dispute the terms

As explained in Moisture Warranty s Initial Brief, Moisture Warranty fully complied with the terms of its warranty Under the warranty Moisture Warranty had the right to either make repairs or to make payment for the damage (Terms and Conditions, R pp 101, 111) The Babaees refused to allow Moisture Warranty to make any repairs and instead demanded payment of the maximum amount recoverable

per year \$20,000 (Tr p 409 R p 671) The warranty's terms also addresses payment

All claims of failure are limited to \$500 per Moisture Location and up to 40 Moisture Locations per home with a maximum per policy limit of \$20,000 per year, or \$60,000 collectively over the full term of the limited warranty

(Terms and Conditions, section II(B)(5), R 101) Upon review of David Blackburn's report Moisture Warranty determined there were five "moisture locations" covered by the warranty (Tr p 410 R p 672) Moisture Warranty sent a check for \$2500 to the Babaees (Letter from McLain to Babae dated 7/31/06 R pp 1030-1031) Thus Moisture Warranty fully complied with the terms of the warranty

The Trial Court erred in failing to grant Moisture Warranty's motions for directed verdict and JNOV as to the breach of warranty claim Judge Cooper's preliminary order addressing the limited issue of arbitration did not, on its face determine any issues of fact as to the overall terms of the contract Rather those issues were left for trial and, based on the evidence admitted at trial Moisture Warranty established its full compliance with the warranty's terms

II THE TRIAL COURT ERRED BY EXCLUDING REFERENCE TO THE BABAEES' RECEIPT OF A SIGNIFICANT PRICE REDUCTION AT THE TIME OF SALE SPECIFICALLY RELATING TO SAME MOISTURE ISSUES CLAIMED UNDER THE WARRANTY

In their Responsive Brief the Babaees argue there is no record support for Moisture Warranty's argument that the trial court erred by excluding evidence that the Babaees received a benefit from the known moisture problems through a reduced purchase price of the house However, the record does support this assertion On October 3, 2004 the agreed upon purchase price for the house was \$810,000

(Contract of Sale dated 10/3/2004, R p 966) On November 8, 2004, the Babaees received a report from Frank Clark of CK Services Inc focused on moisture issues related to the synthetic stucco (CK Services Report dated 11/8/04 R pp 901-919) This is the same report the Babaees later submitted to Moisture Warranty as a basis for their warranty claim in 2006 (January 11, 2006 Letter from Babae to Moisture Warranty R pp 979-995)

Also on November 8 2004 Mr Babae wrote a letter to Buddy Lewis the realtor listing items that needed repair before closing (Letter from Babae to Lewis dated 11/8/04 R p 972) This list included moisture related issues Id Prior to closing, Lewis sent a fax to the sellers regarding bids for stucco repairs (Tr pp 511-514 R pp 771-774) Clearly this indicates that the cost of stucco repairs was part of the negotiations for the purchase price of the house Further at trial the seller's adult son testified that he met with Mr Babae prior to the sale of the house, and Mr Babae indicated there were problems with the stucco requiring its removal (Tr pp 496-497 R pp 757-758) The house was eventually sold on November 18 2004 for \$700 000 (HUD Settlement Statement Tr pp 497-500 R pp 974 758-761) This is a \$110,000 reduction in price Mr Babae testified that non-moisture related repairs were made to the house for a total of \$70 000 (Tr pp 174-175, R pp 437-438) Accordingly, \$40,000 remains — \$40 000 which is attributable to moisture related issues

Despite all of this evidence, the Trial Court would not allow Moisture Warranty to assert that the Babaees received a price reduction from the sellers for known moisture problems (Tr pp 155 480, R pp 418, 742) Therefore, the addendum

from the realtor's office stating [seller to give credit of \$110,000 to purchase for stucco repairs or replacement at closing" was proffered but not admitted into evidence (Tr. p. 159; Memorandum Supporting Post Trial Motions, Exhibit C, R. pp. 422-115). Thus, the record contains ample evidence to support the fact that the Babaees had already been compensated for any alleged moisture issues with the home. The trial court erred by not allowing Moisture Warranty to argue that the Babaees benefited from a \$40,000 price reduction directly attributable to moisture issues, and then more than a year later sought a duplicative recovery under the warranty. Hence, this Court should hold that this \$40,000 price reduction (\$110,000 minus the \$70,000 non-moisture related repairs) negates the trial court's award of \$20,000 and judgment should be entered for Moisture Warranty.

CONCLUSION

Based on the above and on the arguments asserted in Moisture Warranty's Initial Brief, this Court should direct the entry of judgment for Moisture Warranty.

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Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and Preferred Home
Inspections Inc Defendants

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is

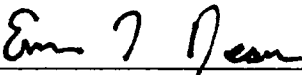
Respondent/Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b),
SCACR

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Warranty

July 29, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A Early III Circuit Court Judge

Case No 2006-CP-40-7215

Fariborz Z Babae and Malihe Babae

Appellants/Respondents

v

Moisture Warranty Corporation d/b/a
Moisture Free Warranty and Preferred Home
Inspections, Inc

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is

Respondent/Appellant

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent/Appellant do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail postage prepaid to the following address(es)
Pleadings

**Final Reply Brief of Respondent/Appellant Moisture
Warranty**

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July 29, 2010



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The South Carolina Court of Appeals

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Re Babae v Moisture Warranty Corporation

Dear Counsel

Enclosed is the opinion of the Court of Appeals in this case Pursuant to Rule 221(b) of the South Carolina Appellate Court Rules, the remittitur in this case will be sent to the Clerk of Court for Richland County after fifteen (15) days exclusive of the date of filing of this opinion

No extension for a Petition for Rehearing will be granted except in the most extraordinary circumstances and, except in the rarest cases, with seven days' notice

Sincerely

A handwritten signature in cursive script that reads "Tonisha E. Fuller".

Tonisha E Fuller
Administrative Assistant

TAG/tf

cc The Honorable Doyet A Early, III

**THIS OPINION HAS NO PRECEDENTIAL VALUE IT SHOULD
NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY
PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Fariborz Z Babae and Malihe
Babae,

Appellants/Respondents

v

Moisture Warranty Corporation
d/b/a Moisture Free Warranty,
and Preferred Home
Inspections, Inc , Defendants,

Of Whom Moisture Warranty
Corporation d/b/a Moisture
Free Warranty is the

Respondent/Appellant

Appeal From Richland County
Doyet A Early, III, Circuit Court Judge

Unpublished Opinion No 2012-UP-030
Heard September 13, 2011 – Filed January 25, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Robert B Phillips, of Columbia, for Appellants-
Respondents

C Mitchell Brown, Thomas William McGee, III, A
Mattison Bogan, and Emma T Dean, all of
Columbia, and Mark Phillips, of Charleston, for
Respondent-Appellant

PER CURIAM Appellants/Respondents Fariborz Babae and Malihe Babae (the Babaees) brought this breach of warranty action against Respondent/Appellant Moisture Warranty Corporation (Moisture Warranty) to recover damages for Moisture Warranty's refusal to pay the full cost of repairs to the Babaees' home after it sustained moisture damage. The circuit court granted Moisture Warranty's motion for a directed verdict on the Babaees' claims for fraud and violation of the South Carolina Unfair Trade Practices Act (UTPA), S C Code Ann §§ 39-5-10 to -560 (1976 & Supp 2010). The jury returned a verdict for the Babaees in the amount of \$140,000 on their breach of warranty claim. The circuit court granted Moisture Warranty's motion for a new trial nisi remittitur, reduced the verdict to \$20,000, and denied Moisture Warranty's motions for a judgment notwithstanding the verdict (JNOV) and new trial absolute. The Babaees appeal, and Moisture Warranty cross-appeals. We affirm in part, reverse in part, and remand.

1 As to the reduction of the jury's verdict, we disagree with the Babaees' argument that this reduction was based on warranty terms to which they did not agree. Significantly, when the Babaees closed on the purchase of their home, they were provided with Moisture Warranty's Letter of Approval, which indicated the home qualified for a warranty against moisture damage, with one exclusion. The Letter of Approval indicated the "level of warranty chosen" was a three-year warranty with a total limit of \$60,000 and a \$20,000 annual limit. The Babaees signed the Letter of Approval, just below the following statement: "I have read and understand this Letter of

Approval dated 11/11/04 and the Moisture Warranty Terms and Conditions
I accept the warranty and any exclusions listed for the home "1

The language in the Letter of Approval was clear and unambiguous in its expression of coverage limits and in its incorporation of the Terms and Limitations document, which also set forth coverage limits of \$20,000 per year for a total of \$60,000 over the full term of the warranty. Further, the warranty stated it did not cover consequential damages. Therefore, the circuit court properly considered the warranty's coverage limits in granting Moisture Warranty's motion to reduce the jury's verdict. See S C Dep't of Natural Res. v Town of McClellanville, 345 S C 617, 623, 550 S E 2d 299, 303 (2001) (holding that the determination of the parties' intent is a question of fact only when the language of a contract is ambiguous), Becker v Wal-Mart Stores, Inc., 339 S C 629, 637, 529 S E 2d 758, 762 (Ct App 2000) ("The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive ") (citation and quotation marks omitted). We affirm the trial court's reduction of the jury's verdict to the limits stated in the Letter of Approval.

2 As to the directed verdict for Moisture Warranty on the UTPA claim, we find more than one reasonable inference exists as to (1) the deceptive nature of the representations in Moisture Warranty's advertising brochure, (2) the potential for repetition, and (3) the existence of damages proximately caused by a UTPA violation, when viewed in the light most favorable to the Babaees.

Initially, Moisture Warranty contends the Babaees did not appeal the directed verdict on their UTPA claim. Moisture Warranty argues the Babaees' notice of appeal, which was filed on March 5, 2009, did not comply

¹ The document in question is entitled "The Terms and Limitations of the MoistureFree Warranty ". Thus, we will refer to this document as "the Terms and Limitations document ". The Babaees contend the circuit court found in a pre-trial order that they did not receive the Terms and Limitations document until after they purchased the home. We disagree with the Babaees' characterization of this order, which merely recited the Babaees' allegation regarding their receipt of the document.

with Rule 203(e)(1)(c), SCACR,² because it did not reference the circuit court's November 21, 2008 judgment, which was entered on (1) the jury's verdict on the breach of warranty claim and (2) the directed verdict on the UTPA and fraud claims. However, the circuit court's February 16, 2009 order granting Moisture Warranty's motion for a new trial also modified the November 21, 2008 judgment, thus, the February 16, 2009 order served as the circuit court's final judgment in this action. See Rule 59(e), SCRCF (allowing for a motion to alter or amend a judgment) (emphasis added), cf Rule 59(f), SCRCF (stating that the time for appeal for all parties shall run from the receipt of written notice of entry of the order granting or denying a timely motion under Rule 59) (emphasis added)

In any event, Moisture Warranty has not shown any prejudice resulting from the omission of the date of the initial judgment. Accordingly, the omission is of a clerical nature only. Cf Weatherford v Price, 340 S C 572, 577-78, 532 S E 2d 310, 313 (Ct App 2000) (rejecting the respondent's argument that the appellant failed to appeal the final order in an action tried non-jury by referring only to the order denying the motion for reconsideration in his notice of appeal because the respondent was not prejudiced and the appellant attached a copy of the final order to his notice of appeal). Therefore, the reference in the Babaees' notice of appeal to the February 16, 2009 order was effective to perfect their appeal of all rulings arising from this action.

As to the merits of this assignment of error, the brochure in question stated in pertinent part "We know what steps to take to assure homeowners that their home is dry, and we guarantee their home will remain dry during the term of the warranty or we'll pay to get it dry." At trial, the Babaees presented a document prepared by the Clemson Extension Service that explained wood moisture content. The document stated that a wood moisture content of 20% to 24% indicates a serious excessive moisture problem and described the 25% to 30% level of wood moisture as often being "the 'too late' level for correcting problem situations without repair costs in the thousands of dollars." However, the warranty defined "excessive moisture"

² Rule 203(e)(1)(c), SCACR, requires the Notice of Appeal to include the date of the order or judgment from which the appeal is taken.

as any moisture reading equal to or above 25% In light of this contrast, the use of the term "dry" in Moisture Warranty's brochure is troubling

Based on the foregoing, we hold the circuit court erred in granting a directed verdict for Moisture Warranty on the UTPA claim See Parrish v Allison, 376 S C 308, 319, 656 S E 2d 382, 388 (Ct App 2007) ("[I]f the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied "), The Huffines Co., LLC v Lockhart, 365 S C 178, 187, 617 S E 2d 125, 129 (Ct App 2005) (holding that in ruling on motions for a directed verdict or JNOV, the trial court is required to view the evidence and reasonable inferences from the evidence in the light most favorable to the party opposing the motions) We reverse this directed verdict and remand for a new trial on the UTPA claim

3 As to the denial of Moisture Warranty's motions for a directed verdict and JNOV, we find the evidence to be susceptible to more than one reasonable inference regarding (1) the existence of an offer to repair, (2) the Babaees' alleged rejection of any such offer, and (3) whether Moisture Warranty's tender of \$2,500 was adequate to fulfill its obligations under the terms of the warranty Therefore, we affirm on this assignment of error

4 As to the exclusion of evidence of the \$110,000 credit given by the sellers toward the home's purchase price, we find this evidence does not tend to make more or less probable the establishment of damages proximately caused by a breach of warranty³ Therefore, the evidence is not relevant See Rule 401, SCRE (defining "relevant evidence") Further, this evidence is prohibited by the collateral source rule See Giannini v S C Dep't of Transp., 378 S C 573, 582-83, 664 S E 2d 450, 455 (2008) (holding that the collateral source rule prohibited a jury instruction on the income tax consequences of a personal injury award), New Found Baptist Church v Davis, 257 S C 443, 446, 186 S E 2d 247, 249 (1972) (holding that compensation received by an injured party from a collateral source, wholly independent of the wrongdoer, does not operate to lessen the damages

³ The record shows the sellers gave this credit to the Babaees for the purpose of stucco repairs or replacement

recoverable from the wrongdoer) We affirm the circuit court's exclusion of this evidence

CONCLUSION

For the foregoing reasons, we affirm (1) the circuit court's order reducing the jury's verdict on the breach of warranty claim, (2) the circuit court's exclusion of evidence regarding the purpose for the \$110,000 reduction in the home's purchase price, and (3) the denial of Moisture Warranty's motions for a directed verdict and JNOV We, however, reverse the directed verdict on the UTPA claim and remand for a new trial on this claim

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

SHORT, WILLIAMS, and GEATHERS, JJ , concur

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A Early III, Circuit Court Judge

Case No 2006-CP-40-7215

Fariborz Z Babae and Malihe Babae, Appellants/Respondents,

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Moisture Warranty Corporation d/b/a
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Inspections, Inc , Defendants

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is

Respondent/Appellant

PETITION FOR REHEARING OF RESPONDENT/APPELLANT MOISTURE
WARRANTY

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SC Court of Appeals

Moisture Warranty Corporation ("Moisture Warranty") hereby files its Petition for Rehearing regarding this Court's Unpublished Opinion number 2012-UP-030, filed January 25, 2012. Respectfully, the panel overlooked or misapprehended several points as particularized herein. The Court of Appeals should have reversed the trial court's denial of Moisture Warranty's motions for a directed verdict and JNOV, should not have reversed the trial court's grant of a directed verdict for Moisture Warranty on the South Carolina Unfair Trade Practices Act ("SCUTPA") claim, and should not have excluded the evidence of the \$110,000 credit given by the sellers towards the home's purchase price to cover stucco repairs or replacement. These points are addressed below *seriatim*.

Argument

I THE COURT OF APPEALS ERRED IN FAILING TO REVERSE THE TRIAL COURT AND GRANT JUDGMENT TO MOISTURE WARRANTY BECAUSE THE BABAEES REFUSED MOISTURE WARRANTY'S ATTEMPTS TO MAKE REPAIRS UNDER THE WARRANTY

The record shows that the Babaees' actions prevented Moisture Warranty from repairing the alleged damage to their home, as the warranty permits. Therefore, the Babaees' breach of the warranty bars the Babaees from recovering in this action. Thus, the trial court erred in failing to grant Moisture Warranty's motion for directed verdict and motion for judgment notwithstanding the verdict, and this Court should have reversed the trial court.

No evidence can support the trial court's ruling because as a matter of law, the Babaees may not recover for breach of contract as they failed to perform their obligations under the contract. South Carolina law is clear that a person that does not

perform his obligations under a contract cannot claim a breach of that same agreement
See American Nat Bank, etc v Caldwell, 166 S C 194, 164 S E 613 (1932)
(holding that if a party to a contract wishes to compel the other party to fulfill the terms
of the contract, the party seeking to enforce the terms of the agreement “must make his
part of the agreement precedent, and cannot proceed against the other without an actual
performance of the agreement, on his part, or a tender and refusal ”) see also Parks v
Lyons, 219 S C 40, 48, 64 S E 2d 123 126 (1951) (“It is an elementary principle that
one who seeks to recover damages for the breach of a contract, to which he was a party,
must show that the contract has been performed on his part, or at least that he was at
the appropriate time able, ready and willing so to perform it ”), Swinton Creek Nursery
v Edisto Farm Credit, ACA, 334 S C 469, 487, 514 S E 2d 126, 135 (1999) (“A
party who seeks to recover damages for breach of a contract must show that the
contract has been performed on his part, or at least that he was, at the appropriate time,
able, ready and willing to perform it ”) Accordingly, because the Babaees prevented
Moisture Warranty from making repairs to the subject property, the Babaees cannot
recover for any purported breach of the agreement because the Babaees’ conduct made
performance impossible and the Babaees did not live up to their responsibilities under
the agreement

This Court found conflicting evidence existed regarding the existence of an offer
to repair, the alleged rejection of such offer, and whether Moisture warranty s tender of
\$2,500 was adequate to fulfill its obligations under the terms of the warranty

Moisture Warranty's warranty specifically provided that Moisture Warranty may fulfill any warranty obligations it has by making repairs as opposed to paying money. The warranty states

Warrantor [Moisture Warranty] reserves the right to make repairs or modifications to the area of failure based on standard industry practices and will have full discretion over the type of repair or modification that is to be made at the specific area that is determined to have high moisture behind the exterior cladding

(Terms and Conditions, R p 101) (emphasis added) Further, Section II (B) subparts 1 and 2 of the warranty explain

1 In the event of the failure of a sealant or flashing on the home's exterior Warrantor [Moisture Warranty] will have a qualified repair contractor make repairs or modifications to the sealant or flashing as necessary to seal or flash the area from future failure

2 Warrantor [Moisture Warranty] may also at its sole discretion choose to pay the homeowner to have repairs made to the extent of the warranty coverage. A sealant or flashing failure is defined as the inability of a sealant or flashing to adequately prevent excessive moisture from entering into or behind the exterior cladding of the home

(Terms and Conditions, R p 101) (emphasis added) Lastly, the warranty provided in Section IV (E) subpart 1 the following

When your request for warranty performance is determined to be a warranted issue, the Warrantor [Moisture Warranty] reserves the right to repair or replace the warranted item or to pay you the reasonable cost of repair or replacement up to the limits of the warranty

(Terms and Conditions, R p 111) (emphasis added) The terms of the warranty unambiguously provide that Moisture Warranty has the right to make repairs instead of paying money to the home owner

While the terms of the warranty are plain and unambiguous that Moisture Warranty had the right to make repairs, the Babaees made Moisture Warranty's

performance of those terms and obligations under the agreement (repairing the parts of the home covered under the warranty) impossible, by refusing to allow Moisture Warranty to actually make repairs. Instead, the Babaees demanded *payment* for the alleged cost of repair.

As the record shows, the Babaees contacted Moisture Warranty about the alleged damage (Babaees' January 3, 2006 Letter, R p 978). At trial, Mr Babae admitted Moisture Warranty was responsive and requested additional information (Tr p 253 R p 516). Moisture Warranty sent an inspector, David Blackburn, to the Babaees house because of the inconsistencies between the Babaees' 2004 Clark report and Moisture Warranty's earlier inspection (Tr pp 371, 408, Blackburn Report, R pp 633, 670, 1014). The inspector's report was provided by Moisture Warranty to the Babaees (Tr p 409, R p 671). Additionally, Moisture Warranty asked Frank Guidera, a repair contractor, to evaluate the range of possible repairs (Tr pp 370-372, R pp 632-634). Mr Guidera went to the Babaees' house as part of this process (Tr p 193, R p 456). Moisture Warranty clearly was attempting to assess the repairs needed on the Babaees' house under the terms under the warranty.

At trial, the following colloquy took place when the president of Moisture Warranty, Christopher Burton, was testifying:

Q And what did Mr Babae do in response to you giving him a copy of the Blackburn Report on February 21, 2006?

A He wanted a check for – I believe at that time he was asking for a check or he wanted money. We were trying to get this established so we could determine what repairs actually needed to be done on the home so we could initiate the repairs.

Q Did Mr Babae ever give you the opportunity to go to his house and inspect it and continue the warranty process?

A No.

Q Mr Babae would n't allow you to perform under the terms of the warranty, would he?

A We could not - there was no authorization by them to proceed with doing repairs. There was an interest in getting money from us and that changed the processing of the claim.

(Tr p 409, R p 671)

Despite Moisture Warranty's attempts to evaluate the alleged damage and begin the repair process as provided by the warranty contract, on April 17, 2006, the Babaees demanded a check for \$20,000 for repairs to various areas of the home in which moisture had intruded. (Tr p 409, Babaees' April 17, 2006 Fax, R pp 671, 1013) The Babaees' April 17th letter referenced an oral estimate from Ace Drywall for over \$24,000 for repairs. (Babae's April 17, 2006 Fax, R p 1013) Also on April 17, 2006, in response to the Babaees' demands, Moisture Warranty sent the Babaees a copy of the warranty's terms and conditions. (Tr pp 271-272, R pp 534-535) The letter stated, "[w]e will certainly attempt to satisfy the terms of the warranty as they apply to your home based on the evidence we have received." (Tr p 272, R p 535) Moisture Warranty requested the Babaees send them a detailed estimate from ACE Drywall. (Tr p 272, R p 535) The Babaees never supplied this estimate, and again on April 21, 2006, the Babaees sent another demand letter for \$20,000 to Moisture Warranty. (Tr p 272, April 21, 2006 Fax, R pp 535, 1029) The Babaees would not allow Moisture Warranty to perform under the terms of the warranty and make repairs. (Tr pp 409-410, R pp 671-672) The Babaees did not want repairs, they wanted money. (Tr p 346, 409, Babaees' April 17, 2006 Fax, Babae's April 21, 2006 Fax, R pp 608A, 671, 1013, 1029)

In sum, the Babaees failed to perform under the contract and denied Moisture Warranty the opportunity to perform its obligation thereunder. Therefore, the Babaees waived their right to recover alleged damages from Moisture Warranty for a purported breach of contract. Accordingly, the trial court erred in denying Moisture Warranty's motions for directed verdict and judgment notwithstanding the verdict and should have been reversed by this Court on this point.

II THE COURT OF APPEALS ERRED IN FAILING TO REVERSE THE TRIAL COURT AND GRANT JUDGMENT TO MOISTURE WARRANTY BECAUSE MOISTURE WARRANTY DID NOT BREACH THE WARRANTY

The trial court committed an error of law in denying Moisture Warranty's motions for directed verdict and judgment notwithstanding the verdict because Moisture Warranty did not breach the warranty. This Court erred in failing to reverse the trial court. No breach was proven, as is set forth below.

First, the warranty specifically provides in Section II (B) subpart 4 that

Warrantor [Moisture Warranty] will be responsible only for the improvement of the sealant or flashing component, and is not responsible for any damage that may, or may not, have been present at or around the specific area of the sealant or flashing failure before the warranty was in effect

(Terms and Conditions, R p 101) (emphasis added). The Babaees knew of the claimed stucco problems prior to the issuance of the warranty. The Babaees received the Clark Report following the Moisture Mapping Survey on November 8, 2004 (Clark Report November 8, 2004, R pp 901-919). This report instructed the Babaees that moisture readings of 20% or above should be addressed (Clark Report November 8 2004, R p 903). The survey included readings of 20% and above, including six

areas with moisture readings above 25% (Clark Report November 8, 2004, R pp 912, 914-915, 919) Twenty-five percent would qualify as excessive moisture under the warranty, if it was in effect then (Terms and Conditions, R p 101) The Clark Report specifically recommended addressing these areas (Clark Report November 8, 2004, R p 903)

On January 3, 2006, the Babaees wrote Moisture Warranty stating that Clark's home inspection had conducted a moisture mapping survey of their home and discovered problems (Babaees' January 3, 2006 letter to Moisture Warranty, R p 978) In response to Moisture Warranty's request for more information, the Babaees wrote Moisture Warranty on January 11, 2006 and included *a portion* of the Clark Report (Babaees' January 11, 2006 letter to Moisture Warranty, R pp 979-995) The Babaees did not include the portion of the letter stating the date Id Instead they included only Clark's list of qualifications, *Clark's recommendations*, and *Clark's moisture mapping survey* Id

Clearly, the Babaees were attempting to collect from Moisture Warranty for alleged damages that they had knowledge of on November 8, 2004, prior to the closing on November 18, 2004 and prior to the issuance of the warranty on November 29, 2004 The very "proof" of moisture problems – the Clark Report – that the Babaees sent Moisture Warranty, was information they had prior to the warranty Therefore, under the terms of the warranty, the Babaees' claims are not covered

Further, section II(B)(5) of the warranty states

All claims of failure are limited to \$500 per Moisture Location and up to 40 Moisture Locations per home with a maximum per policy limit of \$20,000 per year or \$60 000 collectively over the full term of the limited warranty

(Terms and Conditions, R p 101) The warranty defines a moisture location as any area equal to or less than 36 inches in diameter with a moisture reading equal to or over 25 percent (Terms and Conditions, R p 100)

Pursuant to this provision¹, Moisture Warranty sent a check for \$2500 to the Babaees (Moisture Warranty Letter from Tim McLain and Check, R pp 1030-1031) This was based on Moisture Warranty's determination under the Blackburn report that there were five "moisture locations " (Tr p 410 R p 672) Under the terms of the warranty, payment for moisture locations was limited to \$500 per moisture location (Terms and Conditions, R p 101) Therefore, as the letter explained, the \$2500 was the maximum amount Moisture Warranty could pay the Babaees under the warranty in any event (Moisture Warranty Letter from Tim McLain and Check, R pp 1030-1031) The Baebees refused this check

The Babaees may not recover for breach of warranty when no breach has transpired Accordingly, this Court should reverse the trial court and direct the entry of judgment in favor of Moisture Warranty

III THIS COURT ERRED IN REVERSING THE DIRECTED VERDICT RULING IN FAVOR OF MOISTURE WARRANTY ON THE SCUTPA CLAIM

A The Babaees failed to appeal the Trial Court's directed verdict in favor of Moisture Warranty as to the UTPA claim This Court's ruling that such was only clerical and not prejudicial is error

Under South Carolina Appellate Court Rule 203(b)(1), "[a] Notice of Appeal must be served within thirty days after written notice of the entry of the order or

¹ This tendered payment was made after the Babaees prevented Moisture Warranty from repairing the problems

judgment ” S C App Ct R 203(b)(1) Prior to submitting the case to the jury, the Trial Court granted Moisture Warranty’s motion for directed verdict as to the UTPA claim (Tr pp 542-43, R 802-803) This grant of directed verdict became appealable by the Babaees after the entry of the judgment on November 21, 2008 (Form 4 Order filed on 11/21/08, R p 13) The time period for filing an appeal on this issue was stayed by Moisture Warranty’s filing of its post-trial motions on November 26, 2008 S C App Ct R 203(b)(1) (providing that the time for appeal by all parties is stayed by the filing of a Rule 59, SCRCP motion) The thirty-day time period in which to perfect an appeal began to run again following the Babaees’ receipt of the Order addressing Moisture Warranty’s post-trial motions on February 27, 2009

While the Babaees did file a timely Notice of Appeal on March 5 2009, this notice did not appeal the directed verdict judgment as to the UTPA claim Rather the Babaees’ Notice of Appeal was limited to only the February 16, 2009 Order granting Moisture Warranty’s motion for new trial *nisi remittitur* See Notice of Appeal filed 3/5/09 (R 124) (stating that it is an appeal of the Order dated February 16, 2009 and making no mention of or reference to the November 21, 2008 Judgment) Contrary to this Court’s apparent ruling, the February 16, 2009 Order was unrelated to the November 21, 2008 judgment While Moisture Warranty concedes the *time* for appeal was not running as of November 21, 2008, when the time *did* begin to run, there was no appeal as to the November 21, 2008 judgment Moisture Warranty’s post-trial motions do not address the directed verdict granted *in its favor* as to the UTPA claim, and the Babaees did not raise any issue relating to the directed verdict ruling during the January 21 2009 hearing or in their January 23, 2009 Reply The February 16, 2009

Order makes no reference whatsoever to the directed verdict ruling. Thus, an appeal of the February 16, 2009 order is simply not an appeal of the prior directed verdict judgment. To perfect such an appeal, the Babaees were required to include specific reference to the November 21, 2001 Judgment. See S C App Ct R. 203(e)(1)(C) (requiring that the Notice of Appeal contain “[t]he date of the order, judgment, or sentence from which the appeal is taken”)

“An appellate court will not consider issues on appeal which have not been preserved for appellate review.” Ulmer v. Ulmer, 369 S C 486, 490, 632 S E 2d 858, 861 (2006) (holding that where the party’s notice of appeal was limited to specific orders by the trial court, no appeal was taken from a separate earlier order). “A portion of a judgment that is not appealed presents no issue for determination by the reviewing court.” Austin v. Specialty Transp. Services, Inc., 358 S C 298, 320, 594 S E 2d 867, 878 (Ct. App. 2004). The Babaees failed to file a timely appeal as to the directed verdict on the UTPA claim encompassed in the November 21, 2008 Judgment, and the inclusion of this issue in their initial brief was, therefore, improper.

This Court’s ruling that the defect in the notice is merely clerical and also of no prejudice is erroneous. In cases where a notice of appeal defect is deemed clerical, it is because the notice has the orders attached but fails to mention them by name in the notice. See Charleston Lumber Company, Inc. v. Miller Housing Corp., 318 S C 471, 458 S E 2d 431 (1996) and Weatherford v. Price, 340 S C 572, 532 S E 2d 310 (Ct. App. 2000). On the other hand, where the party does not do this, and especially further where the problem is pointed out and no action is taken to request correction of the notice, the problem is not deemed clerical. Instead, the defect is jurisdictional. See

Connor v City of Forest Acres, 348 S C 454, 560 S E 2d 606 (2002)(reversing Court of Appeals for permitting backdated correction of appeal notice five months after filing of defective notice and after warning given of defective notice) Here the November 2008 judgment was never referenced in the notice of appeal of the Baebees Not until the receipt of the Baebees' appeal brief did Moisture Warranty ever know the Baebees intended on attacking the November 2008 judgment as the notice of appeal never mentioned it Moisture Warranty raised the problem with the notice in its appeal brief The Baebees never made any effort to attempt to correct the notice through any motion This is not a clerical error as this Court ruled

Further, no prejudice need be shown when the defect in the appeal is jurisdictional In any event, the error is highly prejudicial to Moisture Warranty Without this ruling reversing the SCUTPA directed verdict judgment, the Baebees would either accept \$20,000 as a judgment against Moisture Warranty or elect a new trial absolute as to the claims that went to the jury Instead, because the Baebees have been allowed to unfairly attack the November 2008 judgment, they may argue they can choose to elect the \$20 000 on the warranty claim, yet *still* get a new trial on the SCUTPA claim *in additon*² This result, if permitted, frustrates the intentions of the new trial *nisi* order of the trial judge, as the intended option - \$20,000 or new trial absolute as to the claims submitted to the jury- is arguably altered adversely to Moisture Warranty

B The Trial Court properly granted Moisture Warranty's motion for directed verdict as to the UTPA claim

² If this is allowed the Baebees will need to elect a remedy in the end Yet this does not cure the prejudice noted above

Even if the Babaees have properly appealed this issue, the Trial Court's granting of directed verdict as to the UTPA claim was proper and should be affirmed. In order to establish a UTPA claim, the Babaees were required to establish that "(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce, (2) the unfair or deceptive act affected public interest, and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010), Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486, 498 (Ct. App. 2006), S.C. Code Ann. §§ 39-5-10 to -560.

The dispute in this case centered entirely on the meaning and effect of the warranty. The Babaees, however, attempted to manipulate a garden-variety breach of warranty case into a SCUTPA claim. In support of this claim, the Babaees assert that Moisture Warranty's guarantee of a "dry" home was deceptive. See Appellants'/Respondents' Initial Brief at pp. 15-16. The facts established at trial belie this assertion.

First, the Babaees misconstrue the meaning of the term "dry." Dry is defined as "free or relatively free from a liquid." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 384 (11th ed. 2003). No matter what exterior is used on a home, there is no such thing as a completely "dry" home. In CK Services, Inc.'s (the Babaees' inspector) November 8, 2004 report, it states that "[i]t is generally accepted that wood when removed from kiln has 19% moisture content." (CK Services Report dated 11/8/04 at p. 3, R. p. 903). Thus, Moisture Warranty's reference to the term "dry" in its brochure cannot reasonably be equated to a guarantee of a completely "dry" home.

Rather, it is at most “puffing” or sales talk Fields v Melrose Ltd P ship, 312 S C 102, 106, 439 S E 2d 283, 285 (Ct App 1993) (affirming dismissal of UTPA claim because the “alleged representations were ‘puffing’ or sales talk permitted by law and on their face were not unfair trade practices ”), Clarkson v Orkin Exterminating Co , Inc., 761 F 2d 189 (4th Cir 1985) (applying South Carolina’s UTPA and holding that “[a] statutory prohibition of deceptive practices simply does not reach expected puffing of a vendor’s product”)

Additionally, there was nothing unfair or deceptive about Moisture Warranty s conduct Moisture Warranty’s brochure states that, “[f]rom our years of experience, we know what steps to take to assure homeowners that their home is dry, and we guarantee their home will remain dry during the term of the warranty or we’ll pay to get it dry ” (Moisture Warranty Brochure, R p 924) Moisture Warranty complied with this promise Upon receiving the Babaees’ claim, Moisture Warranty retained David Blackburn of Stucco Inspector to inspect the house (Tr pp 370-371, 408, Blackburn Report dated 2/21/06, R pp 632-633, 670, 1014) After Mr Blackburn confirmed that there were areas requiring repairs, Moisture Warranty retained a repair contractor, Frank Guidera, to evaluate the possible scope of repairs (Tr pp 370-372, R pp 632-633) The Babaees, however, refused to allow Moisture Warranty to perform any repairs (Tr pp 345, 409, R pp 608, 671) Instead, the Babaees demanded that Moisture Warranty pay them the \$20,000 maximum annual claim amount (Tr p 409, R p 671) Since the Babaees refused to allow them to make any repairs Moisture Warranty offered them \$2500 representing the \$500 per area warranty limit for the five areas where repairs were determined to be necessary

(Tr p 410, Letter from McClain to Babae (undated) enclosing check dated 7/31/06, R pp 672, 1030-1031) Thus, Moisture Warranty did take steps to repair the house and to pay for repairs to the house

The dispute in this case is whether Moisture Warranty lived up to the terms of its warranty Moisture Warranty's position was that there were five areas needing repairs and they would have those areas repaired When the Babaees refused to permit this, Moisture Warranty offered to pay the Babaees \$500 per area, as per the limitations of the Warranty It is not truly a dispute as to whether Moisture Warranty engaged in any unfair or deceptive act As recognized by the Trial Court

This case just has not risen to the level of something that is immoral, unethical, or that unfair trade practice or oppressive I mean - - I patiently or impatiently have sat through this thing for three days and its just a typical breach of warranty case to me

I don't think it rises to the level of conduct which the Unfair Trade Practices Act tries to preclude

(Tr pp 549, 553, R pp 809, 813) Because there was no unfair or deceptive act, there could be no violation of the Unfair Trade Practice Act

2 The Babaees have also failed to establish any damages proximately caused by a violation of the Act

Even if there was a violation of the Act, the grant of directed verdict was proper because the Babaees failed to establish any damages proximately caused by the alleged violation of the Act Moisture Warranty's terms and conditions state that it may repair or pay the homeowner for areas of moisture (Terms and Conditions, R pp 101, 111) The Babaees refused to allow Moisture Warranty to perform repairs and refused to accept payment in accordance with the warranty's terms (Tr pp 345, 409-

10, R pp 608, 671-672) Any damages suffered by the Babaees were the direct result of their refusal to allow Moisture Warranty to perform under the Warranty

IV THIS COURT ERRED IN AFFIRMING THE TRIAL COURT'S EVIDENCE RULING WHEREIN IT FAILED TO ALLOW INTO EVIDENCE THE BABAEES' \$110,000 CREDIT TOWARDS THE PURCHASE OF THEIR HOME

When the Babaees purchased their home, they received a \$110,000 credit due to the alleged stucco problems The negotiations between the Babaees and the previous home owners was based on the Babaees supposed desire to make repairs and is documented by evidence the trial court refused to admit (Memorandum Supporting Post Trial Motions, Exhibit C, R p 115) A document specifically states that a \$110,000 credit is given to the Babaees for "stucco repairs and replacement " (Tr p 136 R p 399) The Babaees sought this price reduction following receipt of the Clark Report (Tr p 137, R p 400) The trial court refused to allow Moisture Warranty to note that the Babaees received this credit at trial (Tr pp 136-156, 480-82, R pp 399-419, 742-744) This Court has now affirmed this ruling This is error

The Babaees initially entered into a contract on the house on August 29, 2004 (Tr pp 234, 506, August Contract, R pp 497 766, 961) The home had a stucco clad exterior (Tr p 504, R p 764) The closing date occurred on November 18, 2004 (Tr pp 208-209, HUD Settlement Statement, R pp 471-472, 974) On November 29, 2004, the Babaees were issued a 3 year limited warranty by Moisture Warranty with an exclusion of certain specified areas of the house, with a notation that the excluded area could become part of the warranty following remediation (Authorization Certificate with Exclusion R p 898) This exclusion was later

removed due to Moisture Warranty's belief that the Babaees had made the necessary repairs to the area (Tr pp 323-325, 439-440, Plaintiff's Exhibit 47, R pp 586-588, 701-702, 934) The \$110 000 seller's credit for repairs for the stucco problems if admitted as it should have been, would have supported Moisture Warranty's belief in this regard - namely, that the exclusions were no longer needed as substantial repairs has already been made satisfactorily The evidence should thus have been admitted

Further, prior to the closing on the home (and prior to the issuance of the warranty by Moisture Warranty), on November 8, 2004, the Babaees received an inspection report regarding the home from Frank Clark Mr Clark's report indicated the existence of unacceptable moisture in the home The contract price for the home was \$810,000 in October 2004 but the house was sold to the Babaees for \$700 000 in November given the \$110 000 credit for stucco repairs (Tr pp 497-500, October Contract, HUD Settlement Statement, R pp 758-761, 966, 974) On January 3, 2006, the Babaees sent a letter to Moisture Warranty stating the Babaees believed there were stucco problems with their home (Babaees' January 3, 2006 Letter, R p 978) Upon Moisture Warranty's request for more information, the Babaees sent *a portion* of Frank Clark's report to Moisture Warranty (Tr p 259, Babaees' January 11, 2006 Letter, R pp 522, 979-995) ³

The \$100,000 credit should have been admitted to show the Baebees had already had their stucco problems addressed before purchasing the warranty involved here, and that all such problems were not covered by the warranty The evidence was also relevant to the credibility of the Babaees Assuming *arguendo* that Moisture Warranty

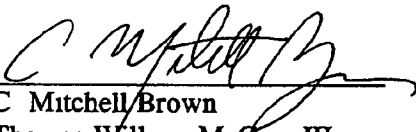
³ Notably the Babaees attempted to change the date on this report to a date after the closing on their home but Mr Clark would not allow the change (Tr p 255 R. p 518)

was not entitled to judgment as a matter of law due to disputed testimony and credibility issues, the \$100 000 credit issued to the Babaees while they simultaneously complained to Moisture Warranty that they had unaddressed moisture problems covered by the warranty should have been made known to the jury

Conclusion

Based on the above, this Court should grant the petition for rehearing

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Warranty

February 9, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A Early III, Circuit Court Judge

Case No 2006-CP-40-7215

Fariborz Z Babae and Malihe Babae, Appellants/Respondents,

v

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and Preferred Home
Inspections, Inc

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is

Respondent/Appellant

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP attorneys for Respondent/Appellant do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereibelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es)

Pleadings

Petition for Rehearing of Respondent/Appellant
Moisture Warranty

Counsel Served

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Lisa P Whitehurst
Administrative Assistant

February 9, 2012

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SC Court of Appeals



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March 2, 2012

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A. Mattison Bogan, Esquire
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Columbia, SC 29211

Re: Babae v. Moisture Warranty Corporation

Dear Counsel:

Enclosed is a copy of an Order of the Court denying your Petition for Rehearing in the above case.

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b).

Please notify this office in writing within ten (10) days from the date of this letter whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also, enclose a check payable to the S.C. Court of Appeals in the amount of \$7.50 to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be disposed of.

Sincerely,

V. Claire Allen

V. Claire Allen
Deputy Clerk of Court

VCA/tf

cc: Robert B. Phillips, Esquire
Charles G. Blackburn, Esquire

The South Carolina Court of Appeals

Fariborz Z. Babaee and Malihe Babaee, Appellants/Respondents

v

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and Preferred
Home Inspections Inc, Defendants

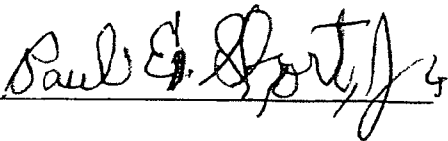
Of Whom Moisture Warranty
Corporation d/b/a Moisture Free
Warranty is the

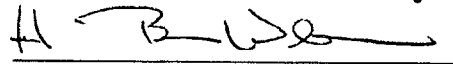
Respondent/Appellant

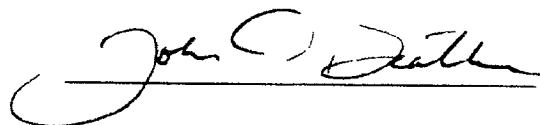
The Honorable Doyet A. Early III
Richland County
Trial Court Case No. 2006 CP 40 07215

ORDER DENYING PETITION FOR REHEARING

PER CURIAM After a careful consideration of the Petition for Rehearing, the court is unable to discover any material fact or principle of law that has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is therefore, ordered that the Petition for Rehearing be denied.

 Short

 J. Williams

 J. Geathers

FILED

March 2, 2012